01-1136

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 01-1136-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL W. CARLSON,

Defendant-Appellant-Petitioner.

DEFENDANT-APPELLANT-PETITIONER'S BRIEF AND APPENDIX

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On appeal from the Circuit Court
of Brown County, Hon. Michael Grzeca and Mark A. Warpinski,
Circuit Judges, presiding; and the Court of Appeals,
Dist. III

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ISSUES FOR REVIEW

1. *What level of English comprehension must a juror have to satisfy a defendant's right to constitutional due process?*

Trial Court: The trial court declined to establish a standard but instead relied primarily on the fact the juror had passed a U.S. citizenship test consisting of two English related questions.

Court of Appeals: The court of appeals did not articulate a due process standard but simply held the trial court had not erroneously exercised its discretion in

finding a juror's English was "sufficient."

2. *Were defendant's constitutional rights to a competent, impartial, and unanimous jury prejudicially violated by a non-English speaking juror?*

Trial Court: The trial court answered "No." The trial court found that the juror in question had a sufficient understanding of English to ensure a fair and impartial trial.

Court of Appeals: The court of appeals answered "No." The court of appeals would not disturb the trial court's finding that the juror in question had a sufficient understanding of English to ensure a fair and impartial trial.

3. *Was defendant's right to a statutorily qualified jury prejudicially violated?*

Trial Court: The trial court answered "No." The trial court found that the juror in question was statutorily qualified.

Court of Appeals: The court of appeals answered "No." The court of appeals would not disturb the trial court's finding that the juror in question was statutorily qualified.

4. *Was trial counsel constitutionally ineffective when he failed to determine there was a non-English speaking person on the jury.*?

Trial Court: The trial court answered "No." The trial court found that the juror in question had a sufficient understanding of English to ensure a fair and impartial

trial and therefore defendant was not prejudiced.

Court of Appeals: The Court of Appeals answered "No." The court of appeals agreed the defendant was not prejudiced.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are requested.

STATEMENT OF THE CASE

Michael W. Carlson ("Carlson") was charged with one count of Second Degree Sexual Assault, as a repeater, contrary to Wis. Stat. § 940.225(2)(a) and 939.62(1)(c). He was accused of forcibly assaulting a woman who had spent the night drinking with him and had accompanied him to his hotel room. Carlson did not deny sexual contact, but claimed it was consensual. Nonetheless, the jury, after claiming itself to be hung, eventually found Carlson guilty as charged. (R 96, 97, 98). Carlson was sentenced to 14 years in prison on May 23, 2000. (R 65; 99).

Carlson filed a motion for postconviction relief on October 23, 2000. (R 72). An evidentiary hearing was held on March 28, 2001, before the Hon. Mark A. Warpinski. Judge Warpinski had replaced Judge Grezca the previous August. (R 100). On April 4, 2001, Judge Warpinski entered a written order denying postconviction relief. (R 79). A notice of appeal was filed on April 19, 2001. On November 13, 2001, the court of appeals issued a decision affirming the conviction.

STATEMENT OF FACTS

1. Facts of the offense

The complainant (K.S.) is a 34-year-old married female who was drinking with friends at a bar. (R 96:88). After several hours of drinking she eventually left with two men she had met that evening. (R 96:112-113) One of those men was Carlson. K.S. allowed Carlson to drive her vehicle to another bar, where they drank more. (R 96:113, 117-118). K.S. also obtained and ingested cocaine and marijuana. (R 96:117-118). When the bar closed at 2:00 a.m., Carlson drove K.S. to the hotel where he and the other man were staying. They arrived at approximately 2:30-2:45 a.m. They were all intoxicated. (R 96:122). The other man went to one room, while K.S. followed Carlson to another. (R 96:124). According to her initial testimony, K.S. agreed to come up to Carlson's room to "talk" and share a soda. (R 96:123). She later admitted she went to Carlson's room for the possibility of more "drugs." (R 98:158). Once in Carlson's room she took off her coat and sat on the bed. Carlson left to get some sodas. When he returned he locked the door and sat next to K.S. on the bed.

What happened next, of course, is disputed. K.S. claims Carlson forced her to have sexual intercourse with him. (R 96:142, 158). While Carlson did not testify, his lawyer argued the intercourse was consensual. (R 96:80).

Afterwards, Carlson asked K.S. if she wanted to see him again the next time he was in town. (R 96:146). He walked K.S. to her van. (R 96:146). K.S. then drove the van around to the front of the hotel and told the attendant she had been raped. (R 96:149). K.S. was taken to the hospital for a sexual assault exam where she was met by her husband. (R 96:153-54).

2. Postconviction Facts

a. Evidence not objected to by the state.

Prior to jury duty all potential jurors receive a "Juror Qualification Questionnaire." (R 77:1; 100:24). This is an official form mandated by Wis. Stat. § 758.18 which, among other things, contains questions and answers relating to the statutory qualifications of Wis. Stat. § 756.02[1]. One of the questions it asks is: "Can you understand the English language?"

These forms are returned to the clerk of courts by prospective jurors. The clerk then reviews them to determine whether any of the questions were answered in such a way as would disqualify the potential juror from jury duty. (R 100:24). See Wis. Stat. § 756.04(9)[2]. If disqualifying answers appear, the person's name is not put on the computerized jury pool list and no further action is taken. (R 100:25).

Tony Vera ("Vera") is an immigrant from Laos. He became a United States citizen approximately eight years ago and is currently a resident of Brown County. (R 100:46). In early 2000 he received a juror questionnaire which he completed and returned on February 2, 2000.

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[1] **Wis. Stat. § 756.02:** "Every resident of the area served by a circuit court who is at least 18 years of age, a U.S. citizen and able to understand the English language is qualified to serve as a juror in that circuit unless that resident has been convicted of a felony and has not had his or her civil rights restored."

[2] **Wis. Stat. § 756.04(9):** "The clerk shall randomly select names from the department list or master list and strike the name of any person randomly selected whose return juror qualification form shows that the person is not qualified for jury service under s. 756.02. The clerk shall certify that the names were selected in strict conformity with this chapter."

Where the form asked if he could "understand the English language," he checked "No." (R 77:1; 100:24-25, 50). Based upon that answer, Vera should have been immediately disqualified as a potential juror. (See Wis. Stat. § 756.04(9)). The Brown County clerk had no explanation for why he wasn't. (R 100:25).

In any event, Vera's name was placed in the computer along with all the other qualifying jurors and eventually he was summoned for jury duty. On the day of trial he was included among the initial pool of 23 jurors. (R 96:4). When he was called forward to join the jury panel he tried to tell the "lady bailiff" he did not understand English, but she told him to sit down and listen. (R 100:45).[3]

Vera sat through the entire voir dire without saying a word. No question was asked of him directly. Questions were directed to the panel as a whole, and only those who raised their hands received individual follow-up questions. As far as the record shows, Vera never raised his hand. (R 100:4-50).

The trial began on March 1, 2000. At one point, before deliberations, some of the jurors went outside to smoke. Vera went out too, but was not smoking. One of the jurors asked him if he had cigarettes and he "just smiled." (R 100:57). She then asked him if he wanted a cigarette and he "just smiled." The juror then took her cigarette pack and passed it to Vera, who then took one. *Id.* During deliberations, the jury sent a note to the judge:

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[3] Vera's comment to the "lady bailiff" was submitted as part of Carlson's offer of proof. Since this occurred before the trial even started, and does not involve deliberations or witness testimony, it seems clear, in retrospect, that this evidence was probably not included in the state's Wis. Stat. 906.06(2) objection. (See R 100:42-43). Therefore, Carlson includes it in this "uncontested" portion of the Statement of Facts.

> Dear sir, We believe that you need to talk to Tony [Vera]. It is our belief that he does not understand most of the trial proceedings. We would like you to evaluate this situation. Thank you.

(R 98:650). A long discussion ensued during which various options were discussed. (R 98:650-658). A concern was raised whether bringing the juror out would be viewed as pressuring him to change his vote. The trial court ultimately decided not to take any action. (R 98:658). The jury found the defendant guilty. (R 98:680).

Carlson's trial attorney testified he had no knowledge Vera or any other juror had a problem understanding the English language. (R 100:12). Had he known about Vera's lack of English language skills he would have asked to have him removed for cause. (R 100:18).

At the postconviction hearing, Vera testified that he had lived in the United States for almost twenty years and that he had become a citizen almost eight years ago. (R 100:46). To gain citizenship, he had to answer two questions in English--one written and one oral. There was no evidence of what this citizenship language test actually consisted of. Vera agreed the test was "very easy." (R 100:47, 55). He had a driver's license. (R 100:47). Vera had studied English as a second language, although he did not say when or for how long. (R 100:48). He wanted to continue studying English, but could not attend classes because of his late shift. (R 100:48). He understood "some" television. (R 100:52). He did not attend movies. (R 100:53). He did not travel within the United States. (R 100:54). Vera also said he tried college but it was hard for him to understand the teachers. (R 100:47-48). Vera answered the jury questionnaire by himself. (R 100:49).

Vera was also questioned about his English comprehension level:

Q. Mr. Vera, how well do you understand spoken English.
A. Just a little bit.
Q. Do you also have trouble speaking English?
A. Yes.
....
Q. Mr. Vera, do you understand people when they speak to you on the street?
A. No, I do not.
....
Q. Can you explain to me what you do for your job?
A. I don't know. I don't know how to explain. It's hard for me to say English, but I understand how to do it.
....
Q. Can you describe for me your typical day?
A. I do not understand that.
Q. You do not understand my question?
A. Yes.
....

Q. Mr. Vera, could you describe a TV show that you recently saw.

THE COURT: Which show are you referring to?

MR. MILLER: Any show he recently saw.

A. I don't understand.
Q. You don't understand my question?
A. No.
Q. When you took the test, English test for citizenship, was that a written test?
A. I don't understand.

(R 100:42, 45, 46, 55).

Vera's immediate work supervisor also testified. Chad Watermolen had known Vera on a personal and professional level for approximately two years and saw

him on a daily basis. (R 100:31). Apart from being his work supervisor, Watermolen was Vera's only English speaking friend. (R 100:50). Vera had serious problems with English at work and in fact did not communicate in English with anyone other than Watermolen. (R 100:32). Watermolen had to speak to Vera "really slow" and use "small words" or he would not get a response. (R 100:33-34). Even then, Vera often did not understand what Watermolen told him to do and had to be shown what the task was. (R 100:32). Because Vera worked on an assembly line[4], he did not actually have to speak any English to do his job. (R 100:36).

b. Evidence objected to by the State as violating Wis. Stat. § 906.06(2)

The state objected to the following evidence pursuant to Wis. Stat. § 906.06(2). Carlson presented this evidence as an offer of proof.

Vera stated without qualification he did not understand the witnesses or the judge at trial. (R 100:44-45). In fact, he was "confused" during the trial. (R 100:44-45).

Because he never said anything, the other jurors were not immediately aware of Vera's English deficiency. It was not until the jurors ordered dinner that Vera's language deficiency became truly evident. As one juror notes in the offer of proof:

> .... Tony [Vera] had not spoken at voir dire or afterwards. During that first meal together [the jurors] were taking orders for sub sandwiches and it became obvious Tony did not understand what they were doing and they could not get him to understand. Eventually one juror said "he is

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[4] "He...takes parts off a line and sets them on a rack." (R 100:36)

having what I am having."

(R 100:58; 77:3).

At least one juror confirmed that Vera did not participate in the deliberations at any level. She testified it was obvious he did not understand the trial testimony; did not understand juror discussions; and did not understand what the jury was supposed to be doing. (R 100:58; 77:3). At one point jurors were asking Vera if he thought Carlson was a "good man or a bad man." (R 100:58; 77:3). The jurors became so concerned they asked the bailiff for a translator, which was declined. *Id.*

Additional facts will be referred to in the argument section of this brief.

ARGUMENT

I. CARLSON'S CONSTITUTIONAL RIGHTS TO A COMPETENT, IMPARTIAL, AND UNANIMOUS JURY, AND HIS STATUTORY RIGHT TO A QUALIFIED JURY WERE PREJUDICIALLY VIOLATED BY A NON-ENGLISH SPEAKING JUROR.

1. Constitutional Claim

The right to an impartial and competent jury is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution as well as the principle of due process. *State v. Louis*, 156 Wis.2d 470, 478, 457 N.W.2d 484, 487 (1990). The right to trial by jury also includes the right to a unanimous criminal verdict. *State v. Kircher*, 189 Wis.2d 392, 525 N.W.2d 788 (Ct.App. 1994); See also *State v. Koput*, 134 Wis.2d 195, 396 N.W.2d 773

(Ct.App. 1986), *reversed on other grounds*, 142 Wis.2d 370, 418 N.W.2d 804 (Right to unanimous verdict in criminal trial cannot be waived.)

The constitutional right to a trial by an impartial jury requires that those who serve on juries meet certain qualifications. At a minimum, juries must be comprised of competent and impartial persons. *Rogers v. McMullen*, 673 F.2d 1185, ¶10 (11th Cir. 1982) (Defendants "'have a due process right to a competent and impartial tribunal.'" *Id.*, citing *Peters v. Kiff*, 407 U.S. 493, 501, 92 S.Ct. 2163, 2168, 32 L.Ed.2d 83 (1972)). A competent juror must be able to: "understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with other jurors during deliberations, and comprehend the applicable legal principles, as instructed by the court." *People v. Guzman*, 555 N.E.2d 259, 261 (N.Y. 1990). See also *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct., 940, 946, 71 L.Ed.2d 78 (1982) ("[D]ue process means a jury *capable* and willing to decide the issue solely on the evidence before it." (Emphasis added)); *State v. Turner*, 186 Wis.2d 277, 284, 521 N.W.2d 148, 151 (Ct.App. 1994) ("[T]he Due Process clause protects a defendant from jurors who are *actually incapable* of rendering an impartial verdict, based upon the evidence and the law." (Emphasis added))

In this constitutional dimension, the error cannot be waived. Defendant is entitled to have his conviction reversed *if* he can show the disqualified juror "was actually biased or incompetent, that is, that the juror was not 'capable and willing to decide the case solely on the facts before [him].'" [cite omitted]. *Rogers v. McMullen*, 673 F.2d 1185, ¶14 (11th Cir. 1982); See also *U.S. v. Soto-Silva*, 129 F.3d 340, ¶11 (5th Cir. 1997) (Motion for new trial based upon a juror's lack of statutory qualification (not raised before trial) should be granted

upon a showing of actual bias or prejudice, or fundamental incompetence.); *United States v. Frank Silverman*, 449 F.2d 1341 (2nd Cir. 1971) (Inclusion of disqualified juror will require reversal if there is a showing of actual prejudice; actual prejudice if juror had been unable to understand English).

This Court has previously recognized the due process concerns raised with non-English speaking jurors:

> The increasingly complexity of the issues presented to juries in cases such as medical malpractice and products liability today *requires more than a minimum "understanding" of the English language on the part of potential jurors.* Jurors today must decide cases raising difficult and complicated questions dealing with accounting problems and engineering design. *It make no sense to argue about the nuances of complicated instructions, if we have no assurance that the jurors sitting in the case have the linguistic ability to recognize, comprehend, analyze or understand the same. If they do not, the instructions are an exercise in futility and the parties litigant are not receiving due process of law.*

(Emphasis added) *State v. Coble*, 100 Wis.2d 179, 216, 301 N.W.2d 221, 239 (1981) (COFFEY, concurring).

2. Statutory Claim

To be qualified, a potential juror must "understand the English language...." Wis. Stat. § 756.02. Moreover, "the clerk...*shall*...strike the name of any person...whose return juror qualification form shows that the person is not qualified for jury service under s. 756.02." (Emphasis added). Wis. Stat. § 756.04(9).

Vera did not meet the statutory qualifications for jury service pursuant to Wis. Stat. § 756.02 because he stated on his Juror Qualification Questionnaire he could not understand English. Further, he did not "understand

the English language" as he was unable to understand the witnesses and judge at trial. The error was not harmless because the clerk should have stricken his name from the jury pool pursuant to Wis. Stat. § 756.04(9). Alternatively, the error was not harmless because Tony's inability to speak English prevented him from meaningful participation in the trial process. (See Wis. Stat. § 805.18; See also *State v. Coble*, 100 Wis.2d 179, 210-212, 301 N.W.2d 221, 236-237 (1981)) (Harmless error doctrine applies to statutory irregularities involving jury selection; substantial rights of the party affected when the jury selection procedure "fails to insure, as does the statutory procedure, that *a jury composed of persons qualified under the statutes* is selected at random from a broad cross-section of the community." (Emphasis added))). See also e.g. *United States v. Okiyama*, 521 F.2d 601 (9th Cir. 1975) (Failure to substantially comply with jury impanelment statutes warranted dismissal of federal indictment, regardless of prejudice showing, especially where the selection process created serious risks that those selected were not sufficiently proficient in English to understand the proceedings in which they were to participate.)

The state did not dispute any of Carlson's substantive legal claims before the court of appeals, apart from the question of prejudice. The question of prejudice boils down to two things: 1) the level of English comprehension both Wis. Stat. § 756.02 and constitutional due process require for jurors; and 2) whether the level of Vera's English comprehension meets the applicable standard. Carlson will therefore focus his brief on these two questions.

3. The trial court erred when it found Vera's English comprehension was sufficient to satisfy both Wis. Stat. § 756.02 and constitutional due process.

a. Standard of Review

A trial court's findings of fact will be upheld unless clearly erroneous. *State v. Broomfield*, 223 Wis.2d 465, 481, 589 N.W.2d 225, 231-32 (1999). Whether the facts amount to prejudice requiring a new trial is a matter of law. *Id.* at 480. Alternatively, the decision to grant or deny a new trial generally lies within the discretion of the trial court. *State v. Wyss*, 124 Wis.2d 681, 717-18, 370 N.W.2d 745, 762 (1985). Nonetheless, an exercise of discretion based on an erroneous application of the law is an erroneous exercise of discretion. *State v. Martinez*, 150 Wis.2d 62, 71, 440 N.W.2d 783, 787 (1989).

b. The trial court erred as a matter of law when it failed to apply a standard of English comprehension consistent with due process.

To satisfy Wis. Stat. § 756.02, a juror must "understand the English language...." To satisfy due process, a juror must be able to comprehend the evidence and arguments presented at trial. See *State v. Gallegos*, 88 N.M. 487, 489, 542 P.2d 832, 834 (N.M. Ct. App. 1975) ("...a juror who does not possess a working knowledge of English would be unable to serve because he cannot possibly understand the issues or evaluate the evidence to arrive at an independent judgment as to the guilt or innocence of the accused."); 50A. C.J.S. *Juries* § 290 (1997) (Minimal English proficiency requires a "*substantial*[]" understanding of the testimony and argument). The state conceded before the court of

appeals that a juror must be able to "comprehend *testimony.*" (Emphasis added) (State's court of appeals brief, p.9). See *State v. Turner*, 186 Wis.2d 277, 284, 521 N.W.2d 148 (Ct. App. 1994) (Constitutional guarantees of an "'impartial jury' and 'due process of law,' require that a criminal defendant not be tried by a juror who cannot *comprehend testimony*." (Emphasis added)). The state also acknowledged the concurrence in *Coble* which requires "*more* than a minimum 'understanding' of the English language on the part of potential jurors."[5] (Emphasis added).

This Court should explicitly hold that a juror must be able to substantially comprehend trial testimony and the judge's instructions in order to satisfy due process. If a juror cannot "substantially comprehend" testimony and instructions, the entire trial process is nothing more than an "exercise in futility." *Coble*, 100 Wis.2d at 216.

The trial court erred as a matter of law when it failed to apply a standard of English comprehension consistent with due process. Indeed, the trial court did not apply *any* articulated standard of English proficiency:

> I think it's very difficult to ask a court to establish a test that would screen out people as participants in the jury system.
>
> ....
>
> ...I think this is a dangerous area in which to venture to say

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[5] *State v. Coble*, 100 Wis.2d 179, 216, 301 N.W.2d 221, 239 (1981). In its court of appeals brief the state tried to distinguish *Coble* as applying only to cases involving the "complexities" of "accounting" and "engineering design." (State's court of appeals brief p. 11, n. 1). This distinction must be rejected for at least two reasons. First, the state cannot seriously be suggesting that threshold English comprehension standards for jurors should depend on the nature or alleged "complexity" of the case. Second, a credibility contest, while different, is no less complex. The subtleties and nuances of language are even more important and the decision--who to believe--is arguably even more difficult and "complex" than a case presenting an "accounting" problem, for example.

> that because someone has less of an understanding of the English language than someone else that that automatically disqualifies them.

(R 100:87, 88; A:5, 6). Instead, the trial court relied primarily upon Vera's citizenship status and his presumptive ability to speak some (unknown) level of English in order to obtain that status:

> What I know is this: That our government has constructed an admissions test to this country which is a citizenship test which is the bedrock of the person's ability to serve on a jury. If you are not a citizen you can't serve. So the government has conducted, for those people not born in this country, a screening mechanism and [Vera] participated through that screening mechanism and was certified by the United States government as a person who could be a citizen of this country.

(R 100:86; A:4).

> The indicia that we have here and objective test, if you will, is that this man took a test to become a citizen of this country and he passed that test. And he responded that there was a written question and an oral question and he passed the test. And if that's the only objective standard we have I think it's a helpful one. It's one that most of us don't have to go through.
>
> *And maybe some other mechanism has to be established*, but I'm going to find that [Vera] has a sufficient understanding of the English language to serve as a juror based upon the record that was made here.[6]

(Emphasis added) (R 100:88-89; A:6, 7).

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[6] While the trial court concluded by stating it was basing its decision "upon the record that was made here," it nonetheless failed to analyze any of its other "findings" or explain how they were relevant to English comprehension. (R 100:89).

There was no evidence of what this citizenship language test actually consisted of. (See R 100:47, 55). Vera also testified the test was "very easy." (R 100:47). More importantly, United States citizenship and English speaking ability are independent statutory qualifications. See Wis. Stat. § 756.02 ("Every resident...who is at least 18 years of age, a U.S. citizen *and* able to understand the English language is qualified...." (Emphasis added)). The trial court plainly erred by assuming U.S. citizenship equaled adequate English language proficiency.

More importantly, the trial court made no findings that Vera was proficient enough in English to do what a juror has to do: "understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with other jurors during deliberations, and comprehend the applicable legal principles, as instructed by the court." *Guzman*, 555 N.E.2d 259, 261 (N.Y. 1990).

The trial court erred as a matter of law when it failed to articulate or apply any kind of English comprehension standard, much less a standard which satisfies due process. See *State v. McCallum*, 208 Wis.2d 463, 473, 561 N.W.2d 707, 710 (Wis. 1997) (Failure to apply the proper legal standard constitutes an erroneous exercise of discretion.)

The court of appeals' decision only adds to the confusion. In rejecting Carlson's argument that a juror must substantially comprehend the evidence and arguments presented at trial, the court of appeals responded that Wis. Stat. § 756.02 "requires *only* that prospective jurors 'understand the English language' in order to serve as a juror. [fn omitted]" (Emphasis added). (court of appeals decision, p. 7; A:16). "*[O]nly*...understand the English language" apparently

does not include actually knowing enough English to understand what the witnesses, judges and other jurors are saying. If so, the standard is too low and fails to satisfy due process. A more reasonable interpretation of Wis. Stat. § 756.02 is that "understand[ing] the English language" means knowing enough English to understand witness testimony and the like. If this were not true, there would be no point in having an English language requirement in the first place.

c. The trial court erroneously found Vera's level of English comprehension satisfied due process.

i. Uncontested Evidence.

Looking only at the uncontested testimony, Vera clearly lacked an ability to understand English *in a narrative form.* He admitted this. When asked if he understood spoken English, he answered: "Just a little bit." (R 100:42). He admitted he could not understand people who speak to him on the street. (R 100:45). He admitted he could not understand his "teachers." (R 100:) He admitted he only understood "some" television. (R 100:52). He did not understand when someone verbally offered him a cigarette. (R 100:57). While Vera did answer some simple and primarily leading questions during the postconviction hearing,[7] any question which called for even the slightest complexity of English comprehension or articulation stumped him. He could not, for example: "describe his typical day;" explain what he did for his job; or describe *any* television show he

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[7] Evidence that a juror possesses the requisite qualifications for jury service must emanate from the juror "uninfluenced by persuasion or coercion" and "unsuggested by leading questions posed to him or her." *Educational Books, Inc. v. Commonwealth*, 349 S.E.2d 903, 907 (1986) (citations omitted).

recently saw.[8] (R 100:45, 46, 55). Whatever else the record may show, Vera cannot possibly be held to understand trial testimony when he is unable to comprehend a simple exchange of words on the street.

The language proficiency guidelines for non-native speakers promulgated by the American Council for the Teaching of Foreign Languages (ACTFL) bears this out. The guidelines separately consider each of the four major language skills: listening, speaking, reading, and writing. "Listening"[9] is divided into ten proficiency levels.[10]

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[8] The state makes much of the one open-ended question Vera could answer, i.e. what he did to get ready for work. Even then, the question had to be repeated and rephrased. (R 100:46). Unfortunately, trial witnesses cannot be asked to rephrase their testimony.

[9] Of course, speaking is also an issue since a juror must not only understand witness testimony and judicial instructions, but communicate effectively with other jurors during deliberations.

[10] The ten proficiency levels are officially described as follows:

Novice-Low
Understanding is limited to occasional isolated words, such as cognates, borrowed words, and high-frequency social conventions. Essentially no ability to comprehend even short utterances.

Novice-Mid
Able to understand some short, learned utterances, particularly where context strongly supports understanding and speech is clearly audible. Comprehends some words and phrases from simple questions, statements, high-frequency commands and courtesy formulae about topics that refer to basic personal information or the immediate physical setting. The listener requires long pauses for assimilation and periodically requests repetition and/or a slower rate of speech.

Novice-High
Able to understand short, learned utterances and some sentence-length utterances, particularly where context strongly supports understanding and speech is clearly audible. Comprehends words and phrases from simple questions, statements, high-frequency commands, and courtesy formulae. May require repetition, rephrasing, and/or a slowed rate of speech for comprehension.

Intermediate-Low
Able to understand sentence-length utterances which consist of recombinations of learned elements in a limited number of content areas, particularly if strongly supported by the situational context. Content refers to basic personal background and needs, social conventions

and routine tasks, such as getting meals and receiving simple instructions and directions. Listening tasks pertain primarily to spontaneous face-to-face conversations. Understanding is often uneven; repetition and rewording may be necessary. Misunderstandings in both main ideas and details arise frequently.

Intermediate-Mid

Able to understand sentence-length utterances which consist of recombinations of learned utterances on a variety of topics. Content continues to refer primarily to basic personal background and needs, social conventions and somewhat more complex tasks, such as lodging, transportation, and shopping. Additional content areas include some personal interests and activities, and a greater diversity of instructions and directions. Listening tasks not only pertain to spontaneous face-to-face conversations but also to short routine telephone conversations and some deliberate speech, such as simple announcements and reports over the media. Understanding continues to be uneven.

Intermediate-High

Able to sustain understanding over longer stretches of connected discourse on a number of topics pertaining to different times and places; however, understanding is inconsistent due to failure to grasp main ideas and/or details. Thus, while topics do not differ significantly from those of an Advanced level listener, comprehension is less in quantity and poorer in quality.

Advanced

Able to understand main ideas and most details of connected discourse on a variety of topics beyond the immediacy of the situation. Comprehension may be uneven due to a variety of linguistic and extralinguistic factors, among which topic familiarity is very prominent. These texts frequently involve description and narration in different time frames or aspects, such as present, nonpast, habitual, or imperfective. Texts may include interviews, short lectures on familiar topics, and news items and reports primarily dealing with factual information. Listener is aware of cohesive devices but may not be able to use them to follow the sequence of thought in an oral text.

Advanced Plus

Able to understand the main ideas of most speech in a standard dialect; however, the listener may not be able to sustain comprehension in extended discourse which is propositionally and linguistically complex. Listener shows an emerging awareness of culturally implied meanings beyond the surface meanings of the text but may fail to grasp sociocultural nuances of the message.

Superior

Able to understand the main ideas of all speech in a standard dialect, including technical discussion in a field of specialization. Can follow the essentials of extended discourse which is propositionally and linguistically complex, as in academic/professional settings, in lectures, speeches, and reports. Listener shows some appreciation of aesthetic norms of target language, of idioms, colloquialisms, and register shifting. Able to make inferences within the cultural framework of the target language. Understanding is aided by an awareness of the underlying organizational structure of the oral text and includes sensitivity for its social and cultural references and its affective overtones. Rarely misunderstands but may not understand

A juror should at least be at the "superior" level. Even at the "advance plus" level, which is one level lower than "superior," a person is *not* able to consistently "sustain comprehension in extended discourse which is propositionally and linguistically complex"--the very definition of trial testimony and instructions. Only at the "superior" level can the individual "follow the essentials of extended discourse which is propositionally and linguistically complex, as in...lectures, speeches, and reports," as well as appreciate idiomatic expressions and "social and cultural references...."

Vera is *at best* a "low-intermediate," as he clearly fails one of the main criteria for that level--i.e. "spontaneous face-to-face conversations." Vera admits he cannot understand a simple street conversation. His difficulty understanding simple direction at work also underscores his questionable placement in this category. (R 32, 33-34). If Vera cannot understand casual conversation or simple direction, he most certainly will not be able to understand the extended question and answer of trial testimony. Only one reasonable conclusion is possible--Vera did not know enough English to be on that jury.

The trial court's conclusion to the contrary is erroneous because it ignores important differences in

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excessively rapid, highly colloquial speech or speech that has strong cultural references.
Distinguished
Able to understand all forms and styles of speech pertinent to personal, social, and professional needs tailored to different audiences. Shows strong sensitivity to social and cultural references and aesthetic norms by processing language from within the cultural framework. Texts include theater plays, screen productions, editorials, symposia, academic debates, public policy statements, literary readings, and most jokes and puns. May have difficulty with some dialects and slang.

(A:20-26).

language proficiency levels and fails to rationally apply the facts of the case to those levels. Being able to buy a pack of cigarettes at the gas station does not mean one is capable of understanding and judging the credibility of an alleged rape victim. Yet that is precisely the approach the trial court takes, relying upon survival language skills as somehow demonstrating much more sophisticated English comprehension, while ignoring the compelling evidence to the contrary.

The trial court's misunderstanding of English proficiency levels is revealed by its comments about the juror qualification questionnaire. The trial court found it "odd" that a juror questionnaire would ask a potential juror if he or she "understood [the English] language" because the potential juror would have to have some "fundamental ability" to understand English in order to answer the question. (R 100:10). As anyone who has ever studied a foreign language can attest, however, "Do you speak [whatever language]?" is probably among the first five things one learns.

Having no proper analytical framework, the trial court misapplies the facts. The trial court cites as evidence of advanced English comprehension, for example, buying a fishing license; watching sports on TV; playing black jack on a slot machine; and having H&R Block prepare his taxes. Yet these facts prove nothing of the sort. Vera does not need to know English to go fishing or buy a fishing license or watch sports on TV. Vera conceded he only understands "some" television, moreover, and does not attend movies. (R 100:52, 53). He plays blackjack on the slot machine rather than the card table because he doesn't want to have to interact with the dealer. (R 100:40). The fact that he, a simple wage earner, cannot complete his own tax return shows, if anything, an English deficiency. These facts do not

support the trial court's conclusion.

Vera's participation "in English as a second language;" his failed attempt at college; and his "gainful" employment are likewise not probative of good English comprehension either. Vera did not say when or how long he had studied English. To the contrary, he conceded he needed to study more English. (R 100:48). He also quit college because he *could not understand* the teachers. *Id.* Vera's "gainful" employment is also irrelevant because his job does not require any English language skills. (R 100:36). Again, the fact that Vera has a job which requires no English language skills says more about his *inability* to speak English than the contrary.

Vera's driver's license also proves little. The record shows nothing of Vera's particular experience in obtaining it. Any assumption about how much English he had to know is purely speculative. At best it proves, again, some very rudimentary English skills.

The trial court also cites Vera's lengthy residence in this country and his citizenship. Again, we know nothing about this two-question citizenship English test which Vera described as "very easy." (R 100:47). One does not, moreover, learn English by osmosis. Simply residing in the United States does not create English skills. Indeed, many immigrant adults residing in this country never do learn English beyond a survival level. See e.g. Cynthia Brown, *A Challenge To The English-Language Requirement of the Juror Qualification Provision of New York's Judiciary Law*, 39 N.Y. Law School Law Review, No. 3, p. 505 (1994).

In its brief to the court of appeals the state makes much of Vera's having completed the juror questionnaire on his own. (State's Court of Appeals brief, p. 13).

Again, this proves little. The form is simple and short. It did not involve listening comprehension. More importantly, no one asked Vera if he, in fact, understood it. When asked if was able to read it, he answered: "I can read little." (R 100:49). No one asked him how long he had worked on it; whether he used a Lao-English dictionary; or whether he had ever completed one before. Ironically, the state now relies upon the same questionnaire in which Vera stated he *did not* understand the English language to prove he did.

The trial court cites many facts but fails to articulate how they demonstrate a level of English comprehension sufficient to satisfy due process. Indeed, the facts are overwhelmingly to the contrary.

ii. Contested Evidence.

Of course, there is more. Vera testified straight out he did not understand the trial testimony. (R 100:44-45). He testified he did not understand the trial judge. *Id.* He could not and did not communicate with other jurors. (R 100:58; 77:3). He could not order dinner. *Id.* Indeed, the jurors themselves asked for a translator, and when that was rebuffed by the bailiff, they sent a note to the judge asking him to intervene because Vera did "not understand most of the trial proceedings." (R 98:650; 77:3). The state objected to this evidence pursuant to Wis. Stat. § 906.06(2),[11] which limits juror testimony concerning

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[11] Wis. Stat. § 906.06(2) reads as follows:

(2) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial

deliberations.

Carlson concedes for the purposes of this appeal that evidence of "any matter or statement occurring during the course of deliberations" is covered by Wis. Stat. § 906.06(2). This would include, for example, evidence concerning Vera's inability to understand or participate in deliberations, his inability to order dinner, and the jurors' request for a translator.

Carlson does not concede that Wis. Stat. § 906.06(2) covers pre-deliberative evidence such as Vera's ability to understand the witnesses or judge or other jurors *during the trial.* By its own terms Wis. Stat. § 906.06(2) does not apply to pre-deliberation evidence. Moreover, whether Vera understood the testimony reveals nothing of the "mind or emotions" or "mental processes" of any juror as it relates to his or her "assent to or dissent from the verdict." See also 3 D. Louisell & C. Mueller, *Federal Evidence,* § 290, p. 151 (1979) (Current update § 290, p. 78) (By its own terms, Rule 606(b)[12] does not exclude juror testimony as to matters occurring before or after deliberations); see also *State v. Wyss*, 124 Wis.2d 681, 715-716, 370 N.W.2d 745, 761-762 (1985) (Juror testified postverdict to pre-deliberation facts relating to his qualifications to serve as juror.) In other words, Vera was not asked how his comprehension of the evidence affected his verdict, only whether he understood the evidence in the first instance.

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information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

[12] Wis. Stat. § 906.06(2) is virtually identical to Rule 606(b) of the Federal Rules of Evidence. *State v. Messelt*, 185 Wis.2d 254, 266, 518 N.W.2d 232, 237 (1994)

In *Tanner v. United States*, 488 U.S. 107, 177-188 (1987). the U.S. Supreme Court appears to have expanded the scope of Federal Rule 606(b) to pre-deliberative conduct by refusing to allow testimony concerning alleged drug use by jurors during trial. Nonetheless, some authorities still view *Tanner* as leaving the scope of Rule 606(b) unresolved: "[*Tanner]* leaves unanswered the critical question: Does the exclusionary doctrine even apply to the period prior to deliberations? ....[*Tanner*] does not expressly say that the Rule applies to this predeliberative misconduct." *Federal Evidence,* § 290, p. 78 (Current update). Perhaps another critical distinction: Tanner made no showing of actual juror incompetency. As this Court is interpreting a Wisconsin evidentiary statute, moreover, it is not bound by *Tanner*.

In any event, even if *Tanner* applies to both deliberative and pre-deliberative evidence, the state evidentiary rule must give way to greater constitutional concerns. A state evidentiary rule cannot deny a defendant the opportunity to show his state and federal constitutional rights to a fair and impartial jury were violated. See e.g. *Doan v. Brigano*, 237 F.3d 722, 736 (6th Cir. 2001) (Ohio's version of Rule 606(b) cannot be used to prevent juror testimony showing a violation of defendant's Sixth and Fourteenth Amendment rights.); See also *State v. Messelt*, 185 Wis.2d 254, 278, 518 N.W.2d 232, 242 (1994) ("This court will not adopt any statutory interpretation which renders meaningless a party's most basic constitutional rights."); *Weinstein's Federal Evidence* (2nd Ed.), at p. 606-20 ("At least in criminal cases, constitutional rights may require inquiry into the circumstances regarding a jury's deliberation regardless of the jurisdiction's rule on impeachment of jurors").

Where there is a strong showing of juror incompetence, an evidentiary hearing is required as a

matter of constitutional right. *Government of Virgin Islands v. Nicholas*, 759 F.2d 107, ¶¶36-42 (3rd Cir. 1985); See also *Anderson v. Burnett County*, 207 Wis.2d 587, 596, 558 N.W.2d 636, 641 (Ct.App. 1996) (Evidence of racial or religious bias would constitute an exception to the rule that mental processes are not subject to post-trial inquiry because of "an obvious default of justice"); see also *United States v. Pellegrini*, 441 F.Supp. 1367, 1371, aff'd 586 F.2d 836 (3d Cir.), *cert denied*, 439 U.S. 1050 (1978) (No further inquiry was warranted because there was no showing of any *significant* difficulty understanding the English language).

Additionally, the core values of Wis. Stat. § 906.06(2) are not affected by an inquiry into fundamental English language competence. Such an inquiry does not ask how or why a decision was made, or who made it. It does not inquire into areas of conscience, opinion, personality, intelligence, mental competence, or even prejudice. It simply asks whether one particular juror has the practical linguistic ability to understand the information provided him at trial so he *can* make a decision. Compared to racial or religious bias, an inquiry into English competence is both limited and objective. The countervailing considerations are strong, moreover. A juror's English language ability directly affects a defendant's constitutional right to a competent and unanimous jury, the bedrock of our system of justice.

In sum, the evidence of Vera's stated inability to understand the witnesses or the judge; his inability to communicate with the other jurors or otherwise meaningfully participate in deliberations; or his inability to order dinner, should be considered in assessing whether Vera sufficiently understands English to satisfy due process. The trial court erred when it refused to do so.

Nonetheless, this case does not turn on the application of Wis. Stat. § 906.06(2). The uncontested evidence convincingly demonstrates Vera's inadequate English comprehension. If this Court agrees, a Wis. Stat. § 906.06(2) inquiry is not necessary.

Because the trial court failed to apply a proper standard of English comprehension or, alternatively, erroneously found Vera's English comprehension was sufficient to satisfy due process, Carlson was denied his state and federal constitutional rights to a fair and impartial jury, due process of law, and a unanimous verdict. He was denied his right to a statutorily qualified jury pursuant to Wis. Stat. § 756.02. His conviction must be reversed.

II. ALTERNATIVELY, TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE.

The defendant was denied his right to effective assistance of counsel under the 6th Amendment of the United States Constitution, and Article I, Section 7 of the Wisconsin Constitution. *Strickland v. Washington*, 466 U.S. 688 (1984); *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711 (1985). Wisconsin uses a two-prong test to determine whether trial counsel's actions constitute ineffective assistance of counsel. *State v. Littrup*, 164 Wis.2d 120, 135, 473 N.W.2d 164, 170 (Ct.App. 1991). The first half of the test considers whether trial counsel's performance was deficient. *Id.* Trial Counsel's performance is deficient if it falls outside "prevailing professional norms" and is not the result of "reasonable professional judgment." *Strickland*, 466 U.S. at 690. Trial counsel, for example, has a duty to be fully informed on the law pertinent to the action. *State v. Felton*, 110 Wis.2d 485, 506-507, 329 N.W.2d 161, 171 (1983). If counsel's performance is found to be deficient,

the second half of the test considers whether the deficient performance prejudiced the defense. *Id.* The defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Harvey*, 139 Wis.2d 353, 375, 407 N.W.2d 235, 246 (1987). The *Strickland* test is not outcome determinative. The defendant need only demonstrate the outcome is suspect. He need not establish the final result of the proceeding would have been different. *State v. Smith*, 207 Wis.2d 258, 275-276, 558 N.W.2d 379, 386 (1997).

Both components of the ineffectiveness test present mixed questions of fact and law. The appellate court will uphold the trial court's factual findings "concerning circumstances of the case and counsel's conduct and strategy" unless they are clearly erroneous. *State v. DeKeyser*, 221 Wis.2d 435, 442, 585 N.W.2d 668 (Ct.App.1998). Whether trial counsel's performance was deficient and prejudicial to the petitioner, however, presents questions of law which the appellate court will review independently of the trial court's determination. *Pitsch*, 124 Wis.2d at 634.

Trial counsel has a duty to determine a juror's qualifications to sit, including language competency. *U.S. v. Gray*, 47 F.3d 1359, ¶31 (4th Cir. 1995) ("[Defendant's] counsel ...could have protected [defendant's] rights by requesting that the district court ask each juror whether he or she could read, write, and understand English."); *Hutchins v. Schwartz*, 724 P.2d 1194 (Alaska 1986) (Counsel had opportunity on voir dire to inquire into all matters within his knowledge which might affect qualification of jurors, and then reasonably raise any objection that might exist as to any member.);

Van Dalen v. State, 789 S.W.2d 334, 336 (Tex.App. 1990) (Counsel must make initial inquiry into whether members of jury panel understand English or face waiver.); *Perkins v. State*, 695 P.2d 1364 (OK 1985) (Duty of counsel to inquire at voir dire).

Carlson may raise a failure to challenge a juror for cause in the context of an ineffective assistance of counsel claim, even if the claim is otherwise waived. *State v. Brunette*, 220 Wis.2d 431, 445, 583 N.W.2d 174, 180 (Ct.App. 1998); *State v. Traynor*, 170 Wis.2d 393, 489 N.W.2d 626 (Ct.App. 1992).

Trial counsel was deficient because he failed to determine whether any of the jurors, and in particular, Vera, was able to understand the English language. In particular, and alternatively, he was deficient as follows: (1) trial counsel failed to obtain the original juror questionnaires which would have revealed Vera's self-reported inability to understand the English language; (2) trial counsel failed to ask during his pretrial voir dire whether the jurors were able to understand the English language; (3) trial counsel failed to request individual voir dire of Vera after the jury returned a note to the court stating Vera did "not understand most of the trial proceedings." (R 98:650).

Each of these will be discussed in turn.

Trial counsel was deficient when he did not request copies of the juror questionnaires. He did not do so because he assumed the jurors were statutorily qualified. (R 100:15, 18-19) Nonetheless, he conceded he "frequently" did ask for the questionnaires. (R 100:15). Had he asked for the questionnaires--which were readily

available to counsel upon request[13]--he would have quickly determined Vera's ineligibility for jury duty. Had he known of Vera's English difficulties, he would have struck Vera for cause. (R 100:18). Trial counsel conceded he had no tactical or strategic reason for failing to do so. (R 100:13).

Trial counsel was also deficient when he did not ask jurors during pretrial voir dire whether they were able to understand the English language. Again, trial counsel did not ask because he assumed the jurors were statutorily qualified. (R 100:18-19). Nonetheless, he conceded that in Milwaukee County--where he primarily practices--each prospective juror is required to stand-up and state his or her name and address, as well as read questions and answers printed on a board. This allows each prospective juror "to demonstrate his or her ability to read...and speak the English language." (R 100:19-20). Trial counsel conceded there was no tactical or strategic reason for failing to do something similar here. (R 100:13).

Trial counsel was also deficient when he failed to request an individual voir dire of Tony after the jury sent a note to the judge stating Tony did "not understand most of the trial proceedings." Although there was a concern special voir dire could place undue pressure on Tony and "single" him out, it was based upon the erroneous assumption Tony might be suffering from some kind of "mental problem." (R 98:653, 657-658). Moreover, there was no danger of putting undue pressure on Tony once the verdict had already been reached but was not yet accepted. Another juror was voir dired at that time and Tony could have easily been brought out and questioned then too. The trial court also asked if there was anything further which needed to be considered before the verdict was

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[13] (R 100:27)

accepted. (R 98:679). Trial counsel answered: "No." Trial counsel conceded there was no tactical or strategic reason for failing to request a voir dire of Tony prior to acceptance of the verdict. (R 100:14).

Trial counsel also agreed there was no conceivable strategic reason for having a juror who does not understand English. (R 100:14-15). He conceded that had he known of Tony's lack of English language skills, he would have asked him to be removed for cause. (R 100:18).

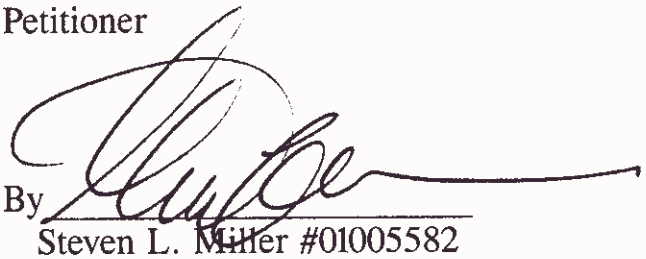
Carlson was prejudiced as Tony was not statutorily qualified to serve as a juror. See Wis. Stat. § 805.18; See also *Coble*, 100 Wis.2d at 210-212. Alternatively, Carlson was prejudiced because Tony's inability to speak and understand English prevented him from meaningful participation in the trial process contrary to his state and federal constitutional rights. See argument, pp. 17-26, *supra*.

CONCLUSION

For the alternative reasons stated, Carlson's conviction should be reversed and the case remanded for a new trial.

Respectfully submitted this 25th day of February, 2002.

MILLER & MILLER
Attorneys for the Defendant-Appellant-Petitioner



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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), and that the text is:

> CG Times proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line.

This brief and certification contain 9992 words.

Dated this 25th day of February, 2002.

MILLER & MILLER
Attorneys for the Defendant-Appellant-Petitioner

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(715-425-9780)

APPENDIX OF
DEFENDANT-APPELLANT-PETITIONER

INDEX TO APPENDIX

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[14] This is a faxed copy of the questionnaire appellate counsel received from the Brown County Clerk of Courts. The original, marked as an exhibit at the postconviction hearing, is in the record.

standard that is required by due process, period.

THE COURT: All right. Well, this is a most troubling case that presents a multitude of issues that need to be sorted through in an effort to resolve them.

The notion that -- and it's not a notion, it's a precept that I think we all hold dearly, that a person who is charged with a crime ought to be afforded a due process. That is a significant notion and one that should not be ignored.

And in an effort to decide the threshold issue, I can only focus on the threshold issue and not on all the other issues involved. The juror's ability to understand the English language is obviously a necessary requirement for a defendant to have his day in court. His due process. And I understand that. But this court is being called upon to measure what is a sufficient understanding of the English language to allow a person to participate in jury deliberations.

Now, I can't decide this case based on what has been told to me about Mr. Vera's

inability to participate in the jury deliberations, that's a separate question and we may get to that, but all of the evidence that has been presented to the court on whether Mr. Vera had a sufficient understanding of the English language to allow him to participate as a juror in our system.

The facts that have been adduced on this record are the following: That Mr. Vera is employed at Krieger international. He was first employed as a part-time individual; was let go then brought back because he was a good employee. The next fact is that Mr. Vera took and successfully passed a citizenship test that was administered by the United States government. Mr. Vera has a valid Wisconsin driver's license. There was also testimony that Mr. Vera goes fishing and is believed to have a Wisconsin fishing license.

Mr. Vera testified that he filed income taxes, he took his taxes to H&R Block for preparation. He testified that he is employed, works third shift and makes $10.55 an hour.

Mr. Vera was asked to leave the courtroom and when asked promptly removed

himself from the courtroom. Mr. Vera took the oath that was administered and responded appropriately. Mr. Vera took the witness stand and responded to questions. Mr. Vera has also participated in English as a second language class at the Family Service Association. He also testified that he went to college but quit because he couldn't understand the teachers.

He watches football, understands the rules and enjoys watching it while he does not have a favorite team. He goes to the casino and plays black jack, I think Mr. Watermolen's testimony was that he plays black jack on the slot machines rather than the tables. He watches basketball but he doesn't understand the rules of basketball.

When asked to describe what he does to get ready for work, Mr. Vera said he didn't understand the question and when asked again he then responded, well, I take a shower, I get dressed and then I go to work. He told us about the fact that he was working third shift. His native language is Lao.

Those facts were in response to questions that were put to Mr. Vera both by Mr.

Miller and Mr. Luetscher on direct and cross-examination.

I think our system envisions that it's a rigorous process. It should also be pointed out that Mr. Vera appeared here today without the need of an interpreter to assist him in responding to questions.

What I know is this: That our government has constructed an admissions test to this country which is a citizenship test which is the bedrock of the person's ability to serve on a jury. If you are not a citizen you can't serve. So the government has conducted, for those people not born in this country, a screening mechanism and Mr. Vera participated through that screening mechanism and was certified by the United States government as a person who could be a citizen of this country.

Our state government also administers a driver's test. Part of it is written. But part of it, from my own common knowledge is that you have to go with an instructor to a road test which is administered in English, to the best of my understanding, and there's nothing in this record to controvert that and

Mr. Vera passed that test.

Mr. Vera is gainfully employed. Mr. Vera enjoys a number of the amenities that are available in this community including football and gambling, legal gambling, and it is difficult for me to construct from all of those understandings a notion that because Mr. Vera has completed a questionnaire and says in that questionnaire and responding to that question, I don't understand the English language. From that I'm supposed to infer from that declaration that he didn't have a sufficient understanding to serve as a juror.

I think it's very difficult to ask a court to establish a test that would screen out people as participants in the jury system. Mr. Vera may well have decided not to actively participate in deliberations because it was more comfortable for him. But that's not unusual. There are other jurors or at other times who have sat back and said nothing and were allowed to continue. There is nothing in this record to indicate that when asked to vote that there were only 11 jurors who voted. This was a unanimous verdict.

At some point, someone had to ask Mr. Vera, How do you vote? And the record that we have before us suggests that we went through a process and it suggests to me -- and I'm going to find -- that Mr. Vera had the requisite ability to understand the English language.

Was it as good as the other 11 jurors? Probably not. Was it as good as Mr. Glynn's or Mr. Luetscher's? Probably not. Was it as good as Judge Grzeca? Probably not. But I think this is a very dangerous area in which to venture to say that because someone has less of an understanding of the English language than someone else that that automatically disqualifies them.

The indicia that we have here and objective test, if you will, is that this man took a test to become a citizen of this country and he passed that test. And he responded that there was a written question and an oral question and he passed the test. And if that's the only objective standard we have I think it's a helpful one. It's one that most of us don't have to go through.

And maybe some other mechanism has to

be established, but I'm going to find that Mr. Vera has a sufficient understanding of the English language to serve as a juror based upon the record that was made here.

Having found that, I'm going to deny the defendant's motion for a new trial for the reasons that were advanced by Mr. Miller in this matter. Anything further, Mr. Miller?

MR. MILLER: Can I prepare an order?

THE COURT: Sure. That would be fine. Anything further, Mr. Luetscher?

MR. LUETSCHER: No.

THE COURT: Thank you.

MS. CECCO: Your Honor, may I say something?

THE COURT: No, I'm sorry, ma'am, Miss Cecco, I have been watching --

MS. CECCO: He did not understand.

THE COURT: That's enough.

MS. CECCO: I believe in this system and it's not working here.

THE COURT: I'm going to tell you this so you have an understanding because I appreciate the fact that you appeared as a juror. There are two different issues here.

We couldn't get to the second one for the reasons I found. If I'm wrong the Appellate Court will reverse this and the come back here and there will be a new trial. So this isn't the final word in this matter. Ma'am, that's all we can really say at this point and I appreciate the part of this, the fact that --

MS. CECCO: It's very difficult to live with.

THE COURT: Then you shouldn't have voted for the decision. That's all. Thank you.

(Thereupon, the hearing was concluded at 10:45 a.m.)

JUROR QUALIFICATION QUESTIONNAIRE

DEAR BROWN COUNTY CITIZEN

You are being considered as a prospective juror in the BROWN County Circuit Court. This is not a summons to appear, but only a questionnaire required by Ch. 756, Wis. Statutes, to determine your eligibility for jury service.

Please complete the following questionnaire and return it within ten days. An envelope is enclosed. Failure to return this form or the willful misrepresentation of a material fact may result in a forfeiture not to exceed $500. If a question does not apply to you, enter "n/a" (i.e., "not applicable"). The information provided by you will be used for the purpose of jury selection only. If you have any questions, contact the Clerk of Circuit Court at 920-448-4172. Your prompt response is appreciated.

10420
TONY B. VERA
1226 BERNER ST
GREEN BAY WI 54302

BROWN COUNTY
Paul Janquart
100 South Jefferson Street
PO Box 23600
Green Bay WI 54305-3600

Please print your answers. If you are a person with a disability and need assistance in completing this form, please contact 920-448-4172

Is the above name and address correct? ☐ yes ☑ no (if "no", enter correct information.)

Name TONY B VERA
Address 1027 Berner St
City Green Bay
State WI Zip 54302

Home Telephone ( ) NONE
Business Telephone (920) 466-2577

Distance in miles from your home to the Courthouse and return: 4 miles.

Wisconsin law requires you to answer questions 1 through 8:	Yes	No
1. Are you a citizen of the United States?	☑	☐
2. Do you live in BROWN County?	☑	☐
3. Are you at least 18 years of age?	☐	☑ 1984
4. Can you understand the English language?	☐	☑
5. Have you been summoned for jury service in the past 4 years? If yes, give date(s) - location ____	☐	☑
6. Do you have any special needs that need to be accommodated for jury service? If yes, explain. ____	☐	☑
7. Have you ever been convicted of a felony?	☐	☑
If yes, have you served your term of imprisonment or otherwise satisfied your sentence?	☐	☐

8. What is your race?
☐ African Am. ☑ Asian or Pacific Islander ☐ Caucasian ☐ Hispanic ☐ Am. Indian or Alaskan Nat. ☐ Other: ____

The following information is requested to speed up the jury selection process:

9. Sex ☑ Male ☐ Female
10. Marital Status ☑ Single ☐ Married ☐ Divorced ☐ Widowed
11. Former Name (if applicable) ____
12. Date of Birth (MM/DD/YY) ____

	Juror Information	Spouse Information
Name	TONY B. VERA	
Occupation	KI Plating	
Employer Name (Most Recent)	K.I	
Employer Address	1330 Bellevue St	
Employer City	Green BAY	
Employer State	WI	
Employer Zip	54308	

You must sign the following, and return the questionnaire within 10 days:
I certify the above information is complete and true to the best of my knowledge.

Tony B Vera (Signature)
2-2-00 (Date)

Exhibit 1

A:9

COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2001

Cornelia G. Clark
Clerk of Court of Appeals

2001 WI App 296

No. 01-1136-CR

STATE OF WISCONSIN IN COURT OF APPEALS

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL W. CARLSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: MICHAEL G. GRZECA and MARK A. WARPINSKI, Judges. *Affirmed.*

Before Cane, C.J., Hoover, P.J., Peterson, J.

¶1 HOOVER, P.J. Michael Carlson appeals a judgment of conviction and an order denying postconviction relief after a jury found him guilty of second-degree sexual assault, as a repeater, contrary to WIS. STAT. §§ 940.225(2)(a) and

939.62(1)(c).[1] He contends that one of the jurors could not understand English sufficiently to serve as a juror and therefore he is entitled to a new trial. We conclude that the trial court's finding that the juror understood English sufficiently to fairly and competently try the case was not clearly erroneous and that a new trial is therefore unnecessary. We affirm the judgment and order.

BACKGROUND

¶2 The Brown County clerk of court sends a juror qualification questionnaire to prospective jurors. One of the questions is whether the prospective juror understands the English language. If a person responds "no" to that question, it is the clerk of court's practice to automatically disqualify that person from jury duty and to remove the person's name from the list of prospective jurors.

¶3 One of the jurors who served on Carlson's jury, Tony Vera, checked "no" on the jury qualification questionnaire in response to the question, "Can you understand the English language?" However, for an unexplained reason, the clerk did not automatically disqualify Vera. His name was entered into the computer for random jury selection, and he was placed on the jury panel for Carlson's case.

¶4 During voir dire, the jury panel was not asked whether any of the jurors had difficulty understanding English. No one asked Vera any individual questions in voir dire. During its deliberations, the jury sent a note to the judge that stated, "We believe that you need to talk to Tony. It is our belief that he does not understand most of the trial proceedings. We would like you to evaluate this

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

situation." The court set forth three possible responses to the note and discussed the options with counsel. Counsel presented concerns that questioning Vera might be seen as pressuring him to change his vote. In light of those concerns, the court decided not to take any action on the note.

¶5 The jury found Carlson guilty. The trial court polled the jury and each juror, including Vera, individually answered "yes" to the question, "Is that your verdict?"

¶6 Carlson filed a motion for postconviction relief requesting a new trial based on Vera's alleged inability to understand English. The trial court held an evidentiary hearing on Carlson's postconviction motion.[2] At the hearing, Vera, Carlson's counsel, the clerk of court, Vera's work supervisor and another juror testified.

¶7 Carlson's counsel and the prosecutor questioned Vera at length in English and without the aid of an interpreter. Vera testified that he has lived in the United States for almost twenty years and that he became a citizen eight years ago. Vera took the written test to obtain his driver's license and passed it. He testified that to become a citizen he passed a citizenship test that had one oral question in English and one written question in English. Vera testified that he had studied English as a second language in Green Bay. He stated that he had read and filled out the jury qualification questionnaire by himself. He testified that he liked to watch the Discovery Channel on television and that he also watched and understood football. Vera testified that he had filed income tax returns with the

[2] Judge Michael G. Grzeca presided over the jury trial, entered the judgment of conviction and sentenced Carlson. Judge Mark A. Warpinski, who replaced Judge Grzeca, conducted the evidentiary hearing on Carlson's postconviction motion and issued the order denying it.

help of H&R Block, a tax preparer. He stated he went out to eat at restaurants and ordered off the menu in English. When asked to describe what he does to get ready for work, Vera was able to explain after the question was rephrased.

¶8 Carlson's counsel asked Vera whether he understood the witnesses at Carlson's trial. The State objected on the basis of WIS. STAT. § 906.06(2),[3] and the court sustained the State's objection. Vera then testified as an offer of proof that he did not understand the witnesses or judge at trial, that he was confused during the trial, and that he had tried to tell the bailiff before jury selection that he did not speak English.

¶9 Another juror testified that Vera did not seem to understand her when she asked him for a cigarette during one of the breaks prior to deliberations. Due to the court's ruling with respect to WIS. STAT. § 906.06(2), counsel submitted a written offer of proof concerning events that occurred after the case was submitted to the jury. The offer of proof alleged that Vera had difficulty ordering a sub sandwich, that he did not meaningfully participate in the deliberations, and that the jurors asked the bailiff for an interpreter for Vera.

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[3] WISCONSIN STAT. § 906.06(2) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

¶10 Vera works on an assembly line at Krieger International, a furniture factory. Chad Watermolen, Vera's work supervisor, testified that Vera had problems with English at work. He also testified that Vera had been let go from his job but was brought back because he was a good worker. Watermolen further testified that Vera drove an automobile to work and that they went fishing together. He stated that Vera was able to get a fishing license and understood the arrangements for going fishing. During Watermolen's testimony, Vera entered the courtroom. The court asked Vera to wait outside the courtroom, and Vera responded to these oral directions by exiting the courtroom.

¶11 At the close of the testimony, the trial court noted: "This all rises and falls on whether ... Mr. Vera understands the English language." The court recognized that due process requires a juror to have sufficient understanding of the English language to participate in jury deliberations. The parties agreed that, if the court were to find that Vera had a sufficient understanding of the English language to serve as a juror, that finding would be dispositive of all the issues raised in Carlson's postconviction motion.

¶12 The trial court found that Vera had "a sufficient understanding of the English language to serve as juror based upon the record that was made here." The court based its finding on "all of the evidence that has been presented to the court on whether Mr. Vera had a sufficient understanding of the English language to allow him to participate as a juror in our system." The court denied Carlson's motion for a new trial because it found that Vera had sufficient understanding of the English language to serve as a juror. Carlson now appeals.

ISSUE

¶13 Carlson argues that the trial court must accept Vera's subjective opinion (and that of another juror) that he did not understand English well enough to fairly and competently hear the case. Carlson also argues that the court did not identify a standard for comprehension or, alternatively, that it did not apply a standard consistent with due process. We disagree. Allowing a juror's subjective opinion as to his or her ability to comprehend testimony at trial would be an open invitation to mischievous attacks on verdicts. We conclude that the trial court properly considered all the evidence that informed on Vera's ability to comprehend English, and found that he understood English well enough to fairly and impartially hear the case, regardless of Vera's opinion. It applied the correct statutory standard. Because credible evidence supports the trial court's finding, it was not clearly erroneous.

DISCUSSION

¶14 The trial court's findings of fact will be upheld unless they are clearly erroneous. WIS. STAT. § 805.17(2). The trial court determined that a new trial was unnecessary because Vera's level of English comprehension was sufficient to satisfy due process requirements. The decision to grant a new trial is within the trial court's discretion and will not be overturned absent an erroneous exercise of that discretion. ***State v. Yang***, 196 Wis. 2d 359, 365, 538 N.W.2d 817 (Ct. App. 1995). We affirm the trial court's decision because the record shows that the court considered the facts of the case and arrived at a conclusion consistent with applicable case law. ***Id.***

¶15 Carlson also argues that the trial court erred by excluding the evidence in Vera's and the other juror's offers of proof. He argues that this

evidence was extraneous information and therefore was not barred by WIS. STAT. § 906.06(2). We disagree. Vera's statements, and what is essentially the opinion of the other juror, do not constitute extraneous prejudicial information improperly brought to the jury's attention. This proffered evidence is not information "coming from the outside." *See* ***State v. Broomfield***, 223 Wis. 2d 465, 478, 589 N.W.2d 225 (1999) (citation omitted).

¶16 In ***Tanner v. United States***, 483 U.S. 107, 117 (1987), the Court interpreted the federal counterpart to WIS. STAT. § 906.06(2) and drew a distinction between external and internal influences on juries. The Court determined that jurors are not competent to testify about internal matters that may have influenced their verdict. ***Tanner***, 483 U.S. at 117-18. It decided further that whether a juror sufficiently understood the English language was not a question of extraneous influence. ***Id.*** at 119. Evidence concerning Vera's understanding of English would be an internal influence on the verdict. Under § 906.06(2), Vera and the other juror were incompetent to testify about the effects of Vera's comprehension of trial testimony on the jury's deliberations.

¶17 In the context of a hearing-impaired juror, a criminal defendant has a due process right to be tried by jurors who comprehend testimony. ***State v. Turner***, 186 Wis. 2d 277, 284, 521 N.W.2d 148 (Ct. App. 1994). Carlson asserts that the correct standard of English comprehension for jury service is that the juror "must substantially comprehend the evidence and arguments presented at trial." WISCONSIN STAT. § 756.02 requires only that prospective jurors "understand the English language" in order to serve as a juror.[4]

[4] WISCONSIN STAT. § 756.02 provides that:

¶18 In ***State v. Coble***, 100 Wis. 2d 179, 301 N.W.2d 221 (1981), our supreme court determined that the Milwaukee County juror qualification questionnaire was too restrictive in requiring a prospective juror to be able to write in English. ***Id.*** at 196. "The history of chapter 756, Stats., demonstrates the development of a legislative policy favoring the reduction of statutory exemptions, exclusions and disqualifications so that the jury would be selected from a broad cross-section of the citizenry ...." ***Id.*** The court determined that a person could have sufficient understanding of the English language to serve on a jury without being able to write in English. ***Id.*** at 191-92.

¶19 Here, Vera testified at the postconviction evidentiary hearing. When a challenged juror testifies, the trial court is in the best position to determine the juror's level of understanding. *See* ***State v. Brunette***, 220 Wis. 2d 431, 441, 583 N.W.2d 174 (Ct. App. 1998) ("We defer to the trial court's decision particularly because of the court's ability to judge the demeanor of the juror ....").

¶20 The trial court made specific findings of fact. The court indicated that filling out a jury qualification questionnaire indicated "some fundamental ability" to understand English. Vera testified that he read and filled out the jury questionnaire by himself. The court noted that Vera responded appropriately to some "very sophisticated questions" posed by both counsel. It pointed out that Vera appeared in court "without the need of an interpreter to assist him in responding to questions."

> Every resident of the area served by a circuit court who is at least 18 years of age, a U.S. citizen and able to understand the English language is qualified to serve as a juror in that circuit unless that resident has been convicted of a felony and has not had his or her civil rights restored.

¶21 Carlson suggests that the court placed too much reliance on the fact that Vera had passed a citizenship test. The court found the fact that Vera had to pass an English test to become a citizen a "helpful" indicia of his ability to understand English. The court noted that, in order to pass the test, Vera had to answer a written question and an oral question in English. However, the court did not rely solely on the citizenship test. The court also noted that Vera would have had to understand English to pass a written test and a road test to get a driver's license. Finally, the court relied on the fact that Vera was gainfully employed, described as a good employee, and able to enjoy community services and activities as an indication of his ability to understand English.

¶22 The trial court also made the following specific findings at the postconviction evidentiary hearing:

> Mr. Vera was asked to leave the courtroom and when asked promptly removed himself from the courtroom. Mr. Vera took the oath that was administered and responded appropriately. Mr. Vera took the witness stand and responded to questions. Mr. Vera has also participated in English as a second language class at the Family Service Association. He also testified that he went to college but quit because he couldn't understand the teachers.
>
> ....
>
> When asked to describe what he does to get ready for work, Mr. Vera said he didn't understand the question and when asked again he then responded, well, I take a shower, I get dressed and then I go to work. He told us about the fact that he was working third shift. His native language is Lao.

¶23 The trial court found the ultimate fact that Vera sufficiently comprehended English based on the underlying facts evinced at the postconviction hearing. The court's finding was not erroneous. Moreover, the court's decision not to grant a new trial was an appropriate exercise of discretion because it found

Vera had a sufficient understanding of English to ensure Carlson's trial was fair and impartial. A reasonable judge could conclude that Carlson was not entitled to a new trial because Carlson already had a fair and impartial trial. The finding properly rested on evidence before the court rather than the subjective opinions of Vera and one other juror. The court properly determined Vera's English comprehension from the testimony and did not rely on Vera's inadmissible conclusory opinion of his own understanding of English.

¶24 Carlson also argues that (1) his statutory rights to a qualified jury were prejudicially violated and (2) his trial counsel was constitutionally ineffective. Both of these arguments depend on Carlson's contention that Vera did not sufficiently understand English so as to serve as a juror. Because we sustain the trial court's finding that Vera sufficiently understood English, we need not address these arguments.

¶25 We conclude that the trial court considered the evidence that informed on Vera's ability to understand English and found that he understood English well enough to ensure Carlson a fair and impartial trial.

By the Court.—Judgment and order affirmed.

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ACTFL guidelines: Listening

In this module group

Here are the modules on ACTFL guidelines for listening:

- ACTFL guidelines: Listening--Novice
- ACTFL guidelines: Listening--Intermediate
- ACTFL guidelines: Listening--Advanced
- ACTFL guidelines: Listening--Superior
- ACTFL guidelines: Listening--Distinguished

Context for this page:

- Overview module: ACTFL guidelines: Listening
- In modular book: ACTFL Proficiency Guidelines, by American Council for the Teaching of Foreign Languages
- In document collection: Other Resources
- In bookshelf: Language Learning

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Page content last modified: 2 September 1998

ACTFL guidelines: Listening--Novice

Novice-Low

Understanding is limited to occasional isolated words, such as cognates, borrowed words, and high-frequency social conventions. Essentially no ability to comprehend even short utterances.

Novice-Mid

Able to understand some short, learned utterances, particularly where context strongly supports understanding and speech is clearly audible. Comprehends some words and phrases from simple questions, statements, high-frequency commands and courtesy formulae about topics that refer to basic personal information or the immediate physical setting. The listener requires long pauses for assimilation and periodically requests repetition and/or a slower rate of speech.

Novice-High

Able to understand short, learned utterances and some sentence-length utterances, particularly where context strongly supports understanding and speech is clearly audible. Comprehends words and phrases from simple questions, statements, high-frequency commands, and courtesy formulae. May require repetition, rephrasing, and/or a slowed rate of speech for comprehension.

See also

- Reaching high novice listening proficiency

Context for this page:

- Generic module: ACTFL guidelines: Listening--Novice
- In overview module: ACTFL guidelines: Listening
- In modular book: ACTFL Proficiency Guidelines, by American Council for the Teaching of Foreign Languages
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Page content last modified: 5 August 1998

ACTFL guidelines: Listening--Intermediate

Intermediate-Low

Able to understand sentence-length utterances which consist of recombinations of learned elements in a limited number of content areas, particularly if strongly supported by the situational context. Content refers to basic personal background and needs, social conventions and routine tasks, such as getting meals and receiving simple instructions and directions. Listening tasks pertain primarily to spontaneous face-to-face conversations. Understanding is often uneven; repetition and rewording may be necessary. Misunderstandings in both main ideas and details arise frequently.

Intermediate-Mid

Able to understand sentence-length utterances which consist of recombinations of learned utterances on a variety of topics. Content continues to refer primarily to basic personal background and needs, social conventions and somewhat more complex tasks, such as lodging, transportation, and shopping. Additional content areas include some personal interests and activities, and a greater diversity of instructions and directions. Listening tasks not only pertain to spontaneous face-to-face conversations but also to short routine telephone conversations and some deliberate speech, such as simple announcements and reports over the media. Understanding continues to be uneven.

Intermediate-High

Able to sustain understanding over longer stretches of connected discourse on a number of topics pertaining to different times and places; however, understanding is inconsistent due to failure to grasp main ideas and/or details. Thus, while topics do not differ significantly from those of an Advanced level listener, comprehension is less in quantity and poorer in quality.

See also

- Reaching intermediate listening proficiency

Context for this page:

- Generic module: ACTFL guidelines: Listening--Intermediate
- In overview module: ACTFL guidelines: Listening
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ACTFL guidelines: Listening--Advanced

Advanced

Able to understand main ideas and most details of connected discourse on a variety of topics beyond the immediacy of the situation. Comprehension may be uneven due to a variety of linguistic and extralinguistic factors, among which topic familiarity is very prominent. These texts frequently involve description and narration in different time frames or aspects, such as present, nonpast, habitual, or imperfective. Texts may include interviews, short lectures on familiar topics, and news items and reports primarily dealing with factual information. Listener is aware of cohesive devices but may not be able to use them to follow the sequence of thought in an oral text.

Advanced Plus

Able to understand the main ideas of most speech in a standard dialect; however, the listener may not be able to sustain comprehension in extended discourse which is propositionally and linguistically complex. Listener shows an emerging awareness of culturally implied meanings beyond the surface meanings of the text but may fail to grasp sociocultural nuances of the message.

See also

- Reaching advanced listening proficiency

Context for this page:

- Generic module: ACTFL guidelines: Listening--Advanced
- In overview module: ACTFL guidelines: Listening
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ACTFL guidelines: Listening--Superior

Superior

Able to understand the main ideas of all speech in a standard dialect, including technical discussion in a field of specialization. Can follow the essentials of extended discourse which is propositionally and linguistically complex, as in academic/professional settings, in lectures, speeches, and reports. Listener shows some appreciation of aesthetic norms of target language, of idioms, colloquialisms, and register shifting. Able to make inferences within the cultural framework of the target language. Understanding is aided by an awareness of the underlying organizational structure of the oral text and includes sensitivity for its social and cultural references and its affective overtones. Rarely misunderstands but may not understand excessively rapid, highly colloquial speech or speech that has strong cultural references.

See also

- Reaching superior listening proficiency

Context for this page:

- Generic module: ACTFL guidelines: Listening--Superior
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Page content last modified: 5 August 1998

ACTFL guidelines: Listening--Distinguished

Distinguished

Able to understand all forms and styles of speech pertinent to personal, social, and professional needs tailored to different audiences. Shows strong sensitivity to social and cultural references and aesthetic norms by processing language from within the cultural framework. Texts include theater plays, screen productions, editorials, symposia, academic debates, public policy statements, literary readings, and most jokes and puns. May have difficulty with some dialects and slang.

See also

- Reaching distinguished listening proficiency

Context for this page:

- Generic module: ACTFL guidelines: Listening--Distinguished
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Page content last modified: 5 August 1998

STATE OF WISCONSIN

IN SUPREME COURT

No. 01-1136-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL W. CARLSON,

Defendant-Appellant-Petitioner.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVITION RELIEF ENTERED IN THE CIRCUIT COURT FOR BROWN COUNTY, THE HONORABLE MICHAEL G. GRZECA AND THE HONORABLE MARK WARPINSKI, PRESIDING, RESPECTIVELY

BRIEF OF PLAINTIFF-RESPONDENT

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IN SUPREME COURT

No. 01-1136-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL W. CARLSON,

Defendant-Appellant-Petitioner.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVITION RELIEF ENTERED IN THE CIRCUIT COURT FOR BROWN COUNTY, THE HONORABLE MICHAEL G. GRZECA AND THE HONORABLE MARK WARPINSKI, PRESIDING, RESPECTIVELY

BRIEF OF PLAINTIFF-RESPONDENT

POSITION ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, both oral argument and publication are appropriate.

SUMMARY OF ARGUMENT

The court of appeals succinctly summarized Carlson's arguments as follows:

> Carlson argues that the trial court must accept [a juror's] subjective opinion (and that of another juror) that he did not understand English well enough to fairly and competently hear the case. Carlson also argues that the court did not identify a standard for comprehension or, alternatively, that it did not apply a standard consistent with due process.

State v. Carlson, 2001 WI App 296, 249 Wis. 2d 264, ¶13, 638 N.W.2d 646. The court of appeals properly rejected Carlson's arguments and determined that the trial court had "considered all the evidence that informed on [the juror's] ability to comprehend English, and found that he understood English well enough to fairly and impartially hear the case." *Id.*

The trial court and court of appeals applied a standard of English comprehension consistent with due process. The court of appeals held that a juror must understand English "sufficiently to fairly and competently try the case." *Id.* at ¶1. According to the court of appeals, the trial court had found that the juror "understood English well enough to fairly and impartially hear the case." *Id.* at ¶13. The court of appeals further noted that the trial court "recognized that due process requires a juror to have sufficient understanding of the English language to participate in the jury deliberations." *Id.* at ¶11.

A standard that requires a juror to have sufficient understanding to fairly and competently try a case complies with due process. The standard accords appropriate discretion to the trial court, which is in the best position to determine the juror's level of understanding and whether the juror's English comprehension is sufficient to try the particular case.

Here, the challenged juror testified at the postconviction motion hearing and the trial court determined that his level of English comprehension had been sufficient to serve as a juror. The trial court's ability to observe the juror answering questions and following directions without the aid of an interpreter provided the best evidence of the juror's ability to comprehend English. As the court of appeals determined:

> The trial court found the ultimate fact that [the juror] sufficiently comprehended English based on the underlying facts evinced at the postconviction hearing. The court's finding was not erroneous.

Id. at ¶23.

The juror's subjective opinion that he did not understand the witnesses sufficiently to serve on the jury was inadmissible under Wis. Stat. § 906.06(2). Post-verdict testimony concerning a juror's comprehension of trial evidence is prohibited because it involves internal influences on the verdict. Such testimony would necessarily involve the "mental processes in connection" with reaching a verdict. *See* Wis. Stat. § 906.06(2); *see also Carlson,* 249 Wis. 2d 264, ¶3. "Allowing a juror's subjective opinion as to his or her ability to comprehend testimony at trial would be an open invitation to mischievous attacks on verdicts." *Id.* at ¶13.

The trial court's determination that the juror had sufficient understanding of the English language to serve as a juror and that the juror's limitations did not warrant a new trial was a proper exercise of discretion. The court based its determination on an observation of the juror responding appropriately to counsel's questions.

> The finding properly rested on evidence before the court rather than the subjective opinions of [the juror] and one other juror. The court properly determined [the juror's] English comprehension from the testimony and did not rely on [the juror's]

> inadmissible conclusory opinion of his own understanding of English.

Id. at ¶23.

ARGUMENT

I. THE TRIAL COURT'S FACTUAL FINDING THAT THE JUROR HAD SUFFICIENT UNDERSTANDING OF THE ENGLISH LANGUAGE TO SERVE AS A JUROR WAS NOT CLEARLY ERRONEOUS.

A. Factual Background.

In Brown County, the clerk of courts develops a list of prospective jurors by first getting a list of names from the motor vehicle department of persons in the county who have been issued a drivers license or an identification card (100:26, 30). The clerk sends a juror qualification questionnaire to each person on the list. Prospective jurors have ten days to return the completed questionnaire (100:26). The county receives and processes thousands of juror questionnaires each year (100:25). One of the questions that is asked on the questionnaire is whether the prospective juror understands the English language. If a person responds "no" to that question, it is the clerk of court's practice to automatically disqualify that person from jury duty and to cull the person's name from the list of prospective jurors (100:24-26).

One of the jurors who served on Carlson's jury, Tony, checked "no" on the jury qualification questionnaire in response to the question, "Can you understand the English language?" (77:1). For some reason, the clerk of courts did not automatically disqualify the juror and his name was entered into the computer for random jury selection (100:25-26).

During voir dire in Carlson's case, the jury panel was not asked whether any of the jurors had difficulty understanding English (100:13). Tony was not asked any individual questions throughout the voir dire procedure (96:3-50). Based on the jurors' eye contact, body language and nodding of heads, Carlson's attorney did not believe that there was anyone on the jury panel who was not understanding what he was asking during the jury selection process (100:21-22).

During its deliberations the jury sent seven notes to the judge (57). The third note stated, "Our votes are currently dead locked at 8-Guilty 4-Not Guilty" (57:3). Following receipt of that note the court and attorneys conducted a lengthy discussion on whether the note warranted a mistrial (98:633-650). At the close of that discussion, the jury sent out a fourth note, which stated, "We believe that you need to talk to Tony. It is our belief that he does not understand most of the trial proceedings. We would like you to evaluate this situation" (57:4; 98:650).

The court set forth three possible responses to the note and solicited counsels' input. The first option was instructing the jury to continue to deliberate. The second option was to question Tony concerning whether he had any problems. The third option was to check Tony's jury qualification questionnaire to determine whether it raised anything (98:652-53). Carlson's counsel responded by renewing his request for a mistrial (98:654). Carlson's attorney argued against questioning Tony, because he was concerned that the group of eight jurors, who had voted to convict Carlson, may have been pressuring Tony to change his vote from not guilty to guilty.

> You really do single this person out. I don't know if the person is being singled out already by anyone other than the two authors of the note . . . .
>
> If your Honor takes action on this, it's going to be seen as reinforcing the view of the people who said we're going to get the judge to straighten out

> Tony and perhaps others. I don't know if Tony is the ringleader of the gang of four or what that means.

(98:657-58.)

In light of counsel's concerns that questioning Tony might be seen as pressuring him to change his vote, the court decided not to take any action on the note (98:658). The jury eventually arrived at a guilty verdict. The jury was polled and each juror, including Tony, individually answered "yes" to the question, "Is that your verdict?" (98: 680-81).

Approximately seven and one half months after trial, Carlson filed a postconviction motion requesting a new trial based on Tony's alleged inability to understand English (72). In support of his motion, Carlson summarized the results of interviewing eleven of the twelve jurors who served on his jury (73:1-2). The state objected to the admission of testimony or affidavits from jurors on the basis of Wis. Stat. § 906.06(2) (75).

The trial court held an evidentiary hearing on Carlson's postconviction motion. At that hearing, Tony, Carlson's trial counsel, the Brown County Clerk of Courts, Tony's work supervisor, and another juror testified (100).

Carlson's counsel and the prosecutor questioned Tony at length without the aid of an interpreter (100:42-56). Tony testified that he had lived in the United States for almost twenty years and that he became a citizen eight years ago (100:46). Tony took the written test to get his drivers license and passed it (100:47). There was an English language component to the citizenship test that Tony passed. He had to answer one question orally in English and answer one question in writing in English (100:55). Tony testified that he had studied English as a second language in Green Bay with Family Services (100:48). He stated that he had read and filled out the jury qualification questionnaire by himself (100:49). He testified that he liked to watch the Discovery Channel on

television and that he also watched and understood football (100:51-52). Tony testified that he had filed income tax returns with the help of H&R Block (100:53). He stated he went out to eat at restaurants and ordered off the menu in English (100:53-54). When asked to describe what he does to get ready for work, Tony was able to explain after the question was rephrased (100:46).[1]

Carlson's counsel asked Tony whether he understood the witnesses at Carlson's trial. The state objected on the basis of Wis. Stat. § 906.06(2) and the court sustained the state's objection (100:42-44). Tony then testified as an offer of proof that he didn't understand the witnesses or judge at trial, that he was confused during the trial, and that he had tried to tell the bailiff before jury selection that he didn't speak English (100:44-45).

Carlson's counsel called a second juror who testified that Tony did not seem to understand her when she asked him for a cigarette during one of the breaks prior to deliberations (100:57). In light of the court's ruling with respect to Wis. Stat. § 906.06(2), counsel did not attempt to elicit any testimony concerning events that occurred after the case was submitted to the jury. Instead, he offered a written offer of proof (100:57-58). The written offer of proof alleged that Tony had difficulty ordering a sub sandwich, that he did not meaningfully participate in the deliberations, and that the jurors asked the bailiff for an interpreter for Tony (77:3).

Tony's work supervisor, Chad Watermolen, testified. During Watermolen's testimony, Tony entered the courtroom. The court asked Tony to wait outside the courtroom and Tony responded to these oral directions by exiting the courtroom (100:33). Although Watermolen testified that Tony had problems with English at work, he

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[1]Tony did not understand what counsel meant by asking him to describe a "typical day." However, he did understand the question "Can you tell me what you do to get ready for work?" Tony answered, "I have to take shower and dress. That's all." (100:46).

also testified that Tony had been let go from his job and then was brought back because he was a good worker (100:37). Watermolen further testified that Tony drove an automobile to work and that they went fishing together. Tony was able to get a fishing license and understood the arrangements for going fishing (100:39).

At the close of the testimony, the court noted that Tony had demonstrated an understanding of "some very sophisticated questions."

> If [Tony] presented himself during the jury trial as he presented himself today, you two accomplished attorneys were asking some very sophisticated questions that he responded to.

(100:66.) Furthermore, the parties agreed that, if the court were to find that Tony had a sufficient understanding of the English language to serve as a juror, that finding would be dispositive of all the issues raised in Carlson's postconviction motion (100:68-69).

The trial court found that Tony had "a sufficient understanding of the English language to serve as juror based upon the record that was made" (100:89). The court recognized that due process requires that a juror have sufficient understanding of the English language to participate in jury deliberations (100:83). The court stated that it was not considering evidence of Tony's inability to participate in the jury deliberations (100:83-84). Instead, the court was making its finding based on "all of the evidence that has been presented to the court on whether [Tony] had a sufficient understanding of the English language to allow him to participate as a juror in our system" (100:84).

The trial court made the following specific findings of fact:

> That [Tony] is employed at Krieger international. He was first employed as a part-time individual; was let go then brought back because he was a good

> employee. The next fact is that [Tony] took and successfully passed a citizenship test that was administered by the United States government. [Tony] has a valid Wisconsin drivers license. There was also testimony that [Tony] goes fishing and is believed to have a Wisconsin fishing license.
>
> [Tony] testified that he filed income taxes, he took his taxes to H&R Block for preparation. He testified that he is employed, works third shift and makes $10.55 an hour.
>
> [Tony] was asked to leave the courtroom and when asked promptly removed himself from the courtroom. [Tony] took the oath that was administered and responded appropriately. [Tony] took the witness stand and responded to questions. [Tony] has also participated in English as a second language class at the Family Service Association. He also testified that he went to college but quit because he couldn't understand the teachers.
>
> He watches football, understands the rules and enjoys watching it while he does not have a favorite team. He goes to the casino and plays black jack, I think Mr. Watermolen's testimony was that he plays black jack on the slot machines rather than the tables. He watches basketball but doesn't understand the rules of basketball.
>
> When asked to describe what he does to get ready for work, [Tony] said he didn't understand the question and when asked again he then responded, well, I take a shower, I get dressed and then I go to work. He told us about the fact that he was working third shift. His native language is Lao.
>
> . . . .
>
> It should also be pointed out that [Tony] appeared here today without the need of an interpreter to assist him in responding to questions.

(100:84-86.)

The court noted that it is a difficult task to ask the court to establish a test to disqualify persons on the basis of their English comprehension. It is not enough that a

person does not actively participate in deliberations. Jurors participate in deliberations on various levels based on their comfort in doing so (100:87). The court was concerned about disqualifying segments of the population on the basis that they do not understand English as well as persons who speak English as their native language (100:88).

The court found the fact that Tony had to pass an English test to become a citizen a "helpful" indicia of his ability to understand English (100:88). However, the court did not rely entirely on the citizenship test. The court also noted that Tony would have had to understand English to pass his road test to get a drivers license (100:86). The court further noted that Tony was gainfully employed and enjoyed a number of the amenities that are available in his community (100:87).

The court denied Carlson's motion for a new trial on the basis of the court's factual finding that Tony had sufficient understanding of the English language to serve as a juror (100:89).

The court of appeals determined that the trial court had applied the correct standard of English comprehension for jury service. The trial court's finding that the juror understood English sufficiently to fairly and competently try the case was not clearly erroneous. *Carlson,* 249 Wis. 2d 264, ¶1. Furthermore, when a challenged juror testifies, the trial court is in the best position to determine the juror's level of understanding. *Id.* at ¶19. The juror was incompetent to testify as to his comprehension of testimony at the trial pursuant to Wis. Stat. § 906.06(2). Such testimony concerns an internal influence on the verdict, which is inadmissible. It does not constitute "extraneous prejudicial information improperly brought to the jury's attention," which is an exception to the bar against juror testimony. *Id.* at ¶15.

B. Standard of review.

The decision to grant a new trial is within the trial court's discretion and will not be overturned absent an erroneous exercise of that discretion. *State v. Yang,* 196 Wis. 2d 359, 365, 538 N.W.2d 817 (Ct. App. 1995). An appellate court will affirm the trial court's decision if the record shows that the court considered the facts of the case and arrived at a conclusion consistent with applicable law. *Id.*

Furthermore, appellate courts review underlying findings of fact by the trial court deferentially, and reverse only if they are clearly erroneous. *State v. Turner,* 186 Wis. 2d 277, 284, 521 N.W.2d 148 (Ct. App. 1994). This is particularly important in cases alleging that a juror did not comprehend testimony. In the case of a hearing-impaired juror, it will almost always be the case that a juror will not be totally deaf. The trial court will always have to determine the extent of the testimony not heard. *Id.* In the case of a person who speaks English as a second language, the court will have to determine the level of that person's comprehension. Thus, "[w]here the motion rests on a challenge to the qualification of a juror, [the] standard of review is highly deferential because, 'the district court is closer to the action and has a better 'feel' for the likelihood that prejudice sprouted.'" *United States v. Nickens,* 955 F.2d 112, 116 (1st Cir. 1992).

C. The trial court's conclusion that Tony understood sufficient English to serve as a juror was consistent with applicable law.

Carlson contends that the trial court did not apply any standard of English comprehension or, alternatively, applied the wrong standard. He asserts that the correct standard of English comprehension for jury service is that

the juror "must be able to substantially comprehend trial testimony and the judge's instructions." Carlson's brief at 15. Carlson is mistaken.

This is an issue of first impression in the State of Wisconsin. In the context of a hearing-impaired juror, this court has stated that a criminal defendant has a due process right to be tried by jurors who "comprehend testimony."

> We conclude that article I, section 7 of the Wisconsin Constitution, which guarantees an "impartial jury," and the Sixth and Fourteenth Amendments to the United States Constitution, which guarantee an "impartial jury" and "due process of law," require that a criminal defendant not be tried by a juror who cannot comprehend testimony.

Turner, 186 Wis. 2d at 284; *see also State v. Hampton,* 201 Wis. 2d 662, 668, 549 N.W.2d 756 (Ct. App. 1996) (remanding to the trial court for a hearing to determine the extent of inattention of juror who was sleeping during the trial); *see also Carlson,* 249 Wis. 2d 264, ¶17.

Furthermore, Wis. Stat. § 756.02 requires that prospective jurors "understand the English language" in order to serve as a juror.

> **756.02 Juror qualifications.** Every resident of the area served by a circuit court who is at least 18 years of age, a U.S. citizen and able to understand the English language is qualified to serve as a juror in that circuit unless that resident has been convicted of a felony and has not had his or her civil rights restored.

However, there are no reported cases in the State of Wisconsin that set a standard for English comprehension for service on a jury. At the postconviction hearing, Carlson's counsel admitted that it is "not a high threshold" (100:11). In the present case, the court of appeals held that a juror must understand English "sufficiently to fairly

and competently try the case." *Carlson,* 249 Wis. 2d 264, ¶1. According to the court of appeals, the trial court had determined that the juror "understood English well enough to fairly and impartially hear the case." *Id.* at ¶13. The court of appeals further noted that the trial court "recognized that due process requires a juror to have sufficient understanding of the English language to participate in jury deliberations." *Id.* at ¶11.

In setting a standard for English comprehension, courts are mindful that setting the standard too high might restrict jury participation based on a person's national origin. In accordance with Wis. Stat. § 756.001, no person may be excluded from jury service based on national origin.

> The history of chapter 756, Stats., demonstrates the development of a legislative policy favoring the reduction of statutory exemptions, exclusions and disqualifications so that the jury would be selected from a broad cross-section of the citizenry. . . .

State v. Coble, 100 Wis. 2d 179, 196, 301 N.W.2d 221 (1981). In *Coble,* the Wisconsin Supreme Court determined that the Milwaukee County juror qualification questionnaire was too restrictive in requiring a prospective juror to be able to write in the English language. The court determined that a person could have sufficient understanding of the English language to serve on a jury without being able to write in English. *Id.* at 191-92.

Carlson cites to language in the concurrence in *Coble* suggesting that more than a minimum understanding of the English language is required for service on a jury. However, the concurrence was particularly concerned with the complexity of "malpractice and products liability" cases and the need to understand "questions dealing with accounting problems and engineering design" in some of those cases. *Coble,* 100 Wis. 2d at 216 (COFFEY, concurring). The present case did not present complex issues or specialized

language. Carlson concedes that the sole issue in dispute was whether the victim consented to sexual intercourse with Carlson. Carlson's brief at 3-4. Although consent is often a difficult question to determine, its difficulties do not lie in the complexity of the language employed.

In his brief, Carlson asserts that "the state cannot seriously be suggesting that threshold English comprehension standards for jurors should depend on the nature or alleged 'complexity' of the case." Carlson's brief at 15, n.5. However, considering the complexity of the case would seem a necessary factor in determining whether a juror had sufficient understanding of English to competently serve as a juror. This is particularly true when the issue is brought to the trial court's attention post-verdict after all of the evidence has been presented.

Whether a juror's English deficiencies warrant striking the person pretrial for cause is a different question than whether the juror's English deficiencies discovered post-verdict warrant a new trial. Determining whether a new trial is warranted is within the trial courts discretion and there is an interest in protecting the finality of the verdict. If the issue is raised pretrial, trial courts are encouraged to err on the side of striking the juror in order to preserve the appearance of impartiality and to save judicial resources.

> [W]e caution and encourage the circuit courts to strike prospective jurors for cause when the circuit courts "reasonably suspect" that juror bias exists." . . . [This standard] encourages circuit courts to err on the side of striking prospective jurors *who appear to be biased*, even if the appellate court would not reverse their determinations of impartiality. Such action will avoid the appearance of bias, and save judicial time and resources in the long run.

State v. Lindell, 2001 WI 108, 245 Wis. 2d 689, ¶49, 629 N.W.2d 223 (emphasis in original) (internal quotations and citations omitted).

Though not directly stated, it appears that courts have considered the nature and complexity of cases in determining whether a new trial is warranted based on a juror's limited English skills. In *United States v. Silverman,* 449 F.2d 1341, 1344 (1971), the court held that the fact the juror could not read English was not prejudicial where the defense was largely based on willfulness. Jurors may be competent to try a particular case even though they are later rejected for lack of English proficiency in another case. *Nickens,* 955 F.2d at 118.

The federal standard for English comprehension for jury service is the ability to read and fill out the jury qualification questionnaire.

> **§ 1865 Qualification for jury service**
> (b) In making such determination the chief judge of the district court . . . or the clerk if the court's jury selection plan so provides, shall deem any person qualified to serve on grand and petit juries in the district court unless he--
>
> . . . .
>
> (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror question form;
>
> (3) is unable to speak the English language . . . ;

28 U.S.C. § 1865(b)(2) and (3).

The federal standard for English comprehension is set low to ensure that juries represent a fair cross section of the community.

> Section 1865(b)(2) makes clear that capability to understand the English language is to be gauged according to the potential juror's ability to sufficiently fill out the juror qualification form . . . . While this standard may seem to be unduly low, it has been adopted to assure that, in accordance with the federal policy articulated in 28 U.S.C. s 1861,

> jurors represent a fair cross section of the community.

United States v. Pellegrini, 441 F. Supp. 1367, 1371 (E.D. Pa 1977). In *The People of the Territory of Guam v. Palomo,* 511 F.2d 255, 258-59 (9th Cir. 1975), the court determined that a juror was qualified, because she understood and answered questions in English and had filled out her questionnaire in English. The court determined that she had sufficient English comprehension to serve on a jury, even though the juror omitted answering a question on the form, had her husband help her answer some of the questions, and admitted having trouble understanding the questions. *Id.*

Several courts have determined that a juror's comprehension of English was sufficient, if the juror could respond correctly to questions posed by the court. *See, e.g., United States v. Aponte-Suarez,* 905 F.2d 483, 492 (1st Cir. 1990). In *United States v. Soto-Silva,* 129 F.3d 340 (5th Cir. 1997), the court determined that the defendant had not met his burden of establishing the juror was fundamentally incompetent to serve on the jury. The juror in question had been excused from service in another case, because of his difficulty understanding English. The juror had stated several times that he did not understand or speak much English. However, the juror did appear to understand the court's questions concerning his education and past jury service and gave "relatively comprehensible and responsive answers." *Id.* at 343-44.

Carlson's proffered standard that a juror must "substantially comprehend trial testimony and judge's instructions" is not mentioned in any reported cases. Carlson relies on a statement in 50A. C.J.S. *Juries* § 290 (1997). However, C.J.S. derives its statements of law from reported cases. The case that it references does not include the "substantial comprehension" standard. Instead, it states:

> The juror . . . said he was a naturalized German-American citizen, and there were some words in the

> English language he might not understand the meaning of. The juror appeared to understand the questions propounded to him by the attorneys, and gave intelligent answers, and, if we were to hold as disqualified all citizens who do not understand the meaning of all words in the English language, the list of men qualified to serve on the juries in this state would be quite limited.

Myers v. State, 177 S.W. 1167, 1171 (Tex. Ct. App. 1915).

Carlson relies on *People v. Guzman,* 555 N.E.2d 259, 261 (N.Y. 1990) as setting a high standard of language facility for jury service. Carlson's brief at 11 and 17. However, *Guzman* is distinguishable because the court was interpreting a specific statute that is very different from Wisconsin's requirement that prospective jurors "understand the English language." Wis. Stat. § 756.02.[2] The prospective juror in *Guzman* was profoundly deaf and could only participate in the jury process through use of an interpreter. *Id.* at 260, n.1. A previous version of the statute under question had automatically excluded disabled persons. *Id.* at 261. *Guzman* is further distinguished from this case in that the issue was whether the prospective juror should have been excluded pretrial for cause. *Id.*

The fact that a juror expresses difficulty understanding the witnesses or the judge is not sufficient reason to disqualify that person from jury service. In *United States v. Gray,* 47 F.3d 1359 (4th Cir. 1995), the court denied the defendant's motion for leave to contact jurors regarding English language proficiency. Allegations that certain jurors spoke English as a second language, had difficulty understanding all the proceedings, and needed the assistance of other jurors to comprehend

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[2] The statute under review provided that a juror must "[n]ot have a mental or physical condition, or combination thereof, which causes the person to be incapable of performing in a reasonable manner the duties of a juror." *Guzman,* 555 N.E. 2d at 261.

certain issues at trial did not even meet the threshold showing of incompetency for leave of court to contact the jurors. *Id.* at 1368.

In *Van Dalen v. Texas,* 789 S.W.2d 334 (Tex. Ct. App. 1990), the court found a juror was not disqualified on the basis of his difficulty understanding the judge's instructions. The juror could read and write English, but had difficulty understanding English, if it was spoken rapidly. He had asked other jurors what some words in the court's charge meant. *Id.* at 336.

Thus, the cases do not establish a specific standard for a juror's language comprehension to be applied in all cases. The federal procedures say that it is enough if the prospective juror can fill out the jury qualification questionnaire. Certainly, that standard was met here. Tony filled out the form by himself, followed the directions for returning the form in a timely manner, and followed the directions for correcting his address in the proper place on the form (100:49; 77:1). Carlson challenges the significance of reading and filling out the jury qualification questionnaire. He speculates that Tony may have used a Lao-English dictionary, worked on the form a long time or had filled out a similar form in the past. Carlson's brief at 24. There is nothing in the record to support these speculations. It was Carlson's burden to present evidence of Tony's lack of competence to serve as a juror.

Carlson suggests that the court placed too much reliance on the fact that Tony had passed a citizenship test. Carlson states that there was no actual evidence of the contents of the citizenship test. Carlson's brief at 17. Again, it was Carlson's burden to establish that passing the citizenship test did not demonstrate a sufficient proficiency in English comprehension for jury service. The court found the citizenship test to be a "helpful" and "objective" factor. The court noted that, in order to pass the test, Tony had to answer a written question and an oral question in English (100:88). However, the court did not

rely solely on the citizenship test as a standard for sufficient English comprehension.

The court noted that Tony had responded appropriately to some "very sophisticated questions" posed by both counsel (100:66). The court indicated that filling out a jury qualification questionnaire indicated "some fundamental ability" to understand English (100:10). The court relied on the fact that Tony passed his drivers license test in English as an indicia of his ability to understand the language (100:86). Finally, the court relied on the fact that Tony was gainfully employed and able to enjoy community services and activities as an indication of his ability to understand English (100:87).

Carlson challenges the significance of Tony's testimony at the postconviction hearing. He states that Tony was only able to answer "simple and primarily leading questions." Carlson's brief at 18. However, this flies in the face of the trial court's specific finding that Tony was able to answer "very sophisticated questions" (100:66). In addition to hearing Tony's oral responses to the questions, the court had the opportunity to judge Tony's demeanor in order to discern whether he understood what was being said. If a challenged juror testifies, the trial court is in a better position to determine the juror's level of comprehension. *See State v. Brunette,* 220 Wis. 2d 431, 441, 583 N.W.2d 174 (Ct. App. 1998) ("We defer to the trial court's decision particularly because of the court's ability to judge the demeanor of the juror. . . ."); *see also Carlson,* 249 Wis. 2d 264, ¶19.

Many of the questions the prosecutor posed to Tony were open-ended and not leading. For example, the prosecutor asked Tony about his roommate and Tony explained that his roommate's name was Chaa, which is pronounced like John in English, the prosecutor's first name. The prosecutor asked Tony what his favorite television shows were and Tony answered that he watched the Discovery Channel. The prosecutor asked Tony what kinds of sports he liked and Tony responded that he liked

football. In questioning Tony about his income tax return, Tony was able to tell the prosecutor how much he paid to have H&R Block file the return and that he normally got a refund of four or five hundred dollars. The prosecutor asked Tony where he liked to go out to eat. Tony responded that he liked to go out for Chinese food and that he ordered his food in English (100:51-54).

For the first time in his brief to this court, Carlson quotes extensively from language proficiency guidelines of the American Council for the Teaching of Foreign Languages (ACTFL). Carlson's brief at 19-21. However, he cites to no court decisions in which these guidelines have been used to determine the competency of a juror. These guidelines have not been subjected to cross-examination in order to explore their usefulness in determining a person's competence to serve on a jury. Carlson simply asserts that a "juror should at least be at the 'superior' level" under the guidelines. He offers no support for this contention. Carlson could have presented expert testimony in the trial court to support his assertions, but the ACTFL guidelines were never brought to the trial court's attention.

Carlson simply asserts that Tony "is *at best* a 'low-intermediate,' as he clearly fails one of the main criteria for that level--i.e. 'spontaneous face-to-face conversations.'" Carlson's brief at 21 (emphasis in original). This assertion is flawed for several reasons. No one except Carlson's counsel has attempted to evaluate Tony under the guidelines. Carlson could have requested that Tony be subjected to an evaluation of his English comprehension and then could have presented that expert testimony to the trial court at the postconviction hearing. He failed to do so. It was Carlson's burden to establish that Tony was not competent to serve on his jury.

Furthermore, in rating Tony on the guidelines, Carlson relies on Tony's subjective opinion that he does not understand people when they speak to him on the street (100:45). Tony's answer may have meant that he

has some difficulty in understanding conversations and that he may not understand everything that is said. A better indication of his comprehension of trial testimony was Tony's ability to understand and answer the questions posed by counsel at the postconviction hearing, which the trial court was in a position to judge for itself.

Both the trial court and the court of appeals correctly applied the applicable law in determining that Tony's language limitations did not warrant a new trial. As the court of appeals held, the trial court's finding that Tony understood English sufficiently to fairly and competently try the case was not clearly erroneous.

> The trial court found that [Tony] had "a sufficient understanding of the English language to serve as juror based upon the record that was made here." The court based its finding on "all of the evidence that has been presented to the court on whether [Tony] had a sufficient understanding of the English language to allow him to participate as a juror in our system."

Carlson, 249 Wis. 2d 264, ¶12 (quoting the trial court's oral decision).

The trial court considered all the facts, weighed them in light of the court's knowledge concerning the duties and obligations of a juror, and determined that Tony had sufficient understanding of the English language to serve as a juror (100:89). Because Tony had testified and the trial court had had the opportunity to observe his demeanor, the court of appeals appropriately deferred to the trial court's determination that Tony had sufficient facility with the English language to fairly and impartially hear Carlson's case. *Carlson,* 249 Wis. 2d 264, ¶19.

The court of appeals held that the appropriate standard for English comprehension is that "the juror understood English sufficiently to fairly and competently try the case" and that the trial court's application of this standard to the facts of this case "was not clearly

erroneous." *Id.* at ¶1. In light of the strong legislative policy to limit exclusions in order to select juries from a broad cross-section of the citizenry and in light of the timing of Carlson's challenge (post-verdict rather than pretrial), this court should adopt the court of appeals standard for English comprehension and affirm the decision.

D. The trial court considered the admissible facts of the case.

Carlson claims that the trial court erred when it misapplied Wis. Stat. § 906.06(2) and, as a result, failed to consider evidence critical to the question of Tony's ability to understand English. The court sustained the state's objection to asking Tony whether he understood the witnesses at trial. Tony testified as an offer of proof that he didn't understand the witnesses or judge at trial, that he was confused during trial, and that he had tried to tell the bailiff before the jury selection that he didn't speak English (100:42-45). In light of the court's ruling, Carlson did not attempt to admit a second juror's testimony concerning events that occurred after the case was submitted to the jury. Carlson submitted a written offer of proof, which alleged that Tony had difficulty ordering a sandwich, that he didn't meaningfully participate in the deliberations, and that the jurors asked the bailiff for an interpreter for Tony during the deliberations (100:57-58; 77:3).[3]

Generally, a juror is incompetent to testify in support of impeaching a jury verdict. The only recognized exception is situations in which an "extraneous

[3]Since Carlson did not attempt to admit this evidence, it is unclear how the court would have ruled, especially with respect to the sandwich incident. The court did allow the juror to testify concerning Tony's apparent confusion when the juror attempted to give him a cigarette (100:57).

influence" was alleged to have affected the jury. *Tanner v. United States,* 483 U.S. 107, 117 (1987). Wisconsin has promulgated this rule in Wis. Stat. § 906.06(2), which states:

> (2) INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

The party seeking to impeach the verdict through juror testimony has the burden of proving that a juror's testimony is admissible under Wis. Stat. § 906.06(2) by first establishing that the testimony concerns extraneous information. *Yang,* 196 Wis. 2d at 366. "'Extraneous information' is defined as information which is neither of record nor the general knowledge that jurors are expected to possess." *Id.* "Extraneous information does not extend to statements which simply evince a juror's subjective mental process; rather, it refers to information 'coming from the outside.'" *State v. Broomfield,* 223 Wis. 2d 465, 478, 589 N.W.2d 225 (1999). "'Extraneous information' is information that is not of record and is not part of the general knowledge we expect jurors to possess. . . . It is information that a juror obtains from a non-evidentiary source. . . . Extraneous information, in contrast with the commonly known facts and experiences we expect jurors to rely on in reading their verdict, comes 'from the outside.'" *State v. Eison,* 194 Wis. 2d 160, 174, 533 N.W.2d 738 (1995).

Carlson draws a distinction between conduct which occurred during deliberations and that which occurred prior to deliberations. He specifically concedes that Wis. Stat. § 906.06(2) would exclude "evidence concerning [Tony's] inability to understand or participate in deliberations, his inability to order dinner, and the jurors' request for a translator." Carlson's brief at 25. Carlson seems to contradict this concession later in his brief when he states, Tony's "inability to communicate with the other jurors or otherwise meaningfully participate in deliberations; or his inability to order dinner, should be considered in assessing whether [Tony] sufficiently understands English to satisfy due process. The trial court erred when it refused to do so." Carlson's brief at 27.

Disregarding the confusion over his concessions, Carlson's main contention is that Tony was competent to testify about his understanding of the witnesses or the judge, because that occurred at trial and not during deliberations. He contends that Wis. Stat. § 906.06(2) does not cover a juror's comprehension of trial testimony. Carlson is wrong.

Wisconsin Stat. § 906.06(2) not only applies to jury deliberations, but to "the effect of anything upon the juror's or any other juror's mind or emotions. . . or concerning the juror's mental processes." Wis. Stat. § 906.06(2). The prohibition is not restricted to events that took place within the jury room.

> The distinction was not based on whether the juror was literally inside or outside the jury room when the alleged irregularity took place; rather, the distinction was based on the nature of the allegation. Clearly, a rigid distinction based only on whether the event took place inside or outside the jury room would have been quite unhelpful.

Tanner, 483 U.S. at 117-18.

The United States Supreme Court, in interpreting the federal counterpart to Wis. Stat. § 906.06(2) [Rule

606(b)], has drawn a distinction between external and internal influences. Jurors are not competent to testify about internal matters that may have influenced their verdict. *Tanner,* 483 U.S. at 117-18. Further, the Court determined that allegations of a juror's inability to hear or comprehend at trial is an internal matter. *Id.* at 118. The Court cited with approval *United States v. Pellegrini,* 441 F. Supp. 1367 (E.D. Pa 1977) for the proposition that "whether juror sufficiently understood English language was not a question of 'extraneous influence.'" *Tanner,* 483 U.S. at 119. The specific holding in *Tanner* determined that intoxication was an internal influence.

> However severe their effect and improper their use, drugs and alcohol voluntarily ingested by a juror seems no more an "outside influence" than a virus, poorly prepared food, or lack of sleep.

Id. at 122.

Citing to an outdated evidence text, Carlson suggests that *Tanner* left unresolved the question of whether Federal Rule 606(b) applies to predeliberative conduct. Carlson's brief at 25, 26 (citing 3 D. Louisell & C. Mueller, *Federal Evidence,* § 290 (1979) (Current update § 290 at 78). The current update to which Carlson cites is dated 1993. In 1994, Mueller issued a second edition of his evidence text. C. Mueller & L. Kirkpatrick, *Federal Evidence* (2nd Edition) (1994). That edition is currently updated as of July 2000. In accordance with Mueller's second edition, the issue of whether Rule 606(b) reaches predeliberative conduct is not an open question. The revised text states that *Tanner* implicitly holds that the rule governs proof of predeliberative jury misconduct. *Id.* at § 248, p. 63. The revised text acknowledges that *Tanner* rejected the position taken in the first edition of the text. *Id.* at § 250, p. 81-82. According to the most recent edition of Mueller's text, the rule clearly reaches conduct occurring prior to formal deliberations.

> [I]n 1987 the Supreme Court decided in *Tanner v. United States* that the Rule does apply to

> predeliberative jury misconduct, using it to bar juror testimony or statements describing consumption of alcohol and drugs during trial, despite a vigorous dissent arguing the Rule "does not exclude juror testimony as to matters occurring before or after deliberations."
>
> . . . .
>
> Unless the Court changes directions, *Tanner* apparently means that the Rule reaches misconduct by the jury after impanelment but before it begins formally to deliberate.

Id. at § 252, p. 86-87.

Questions concerning Tony's comprehension of trial testimony, his limited participation in the deliberations, and the jury's attempt to obtain an interpreter to aid Tony in the deliberations are internal influences on the verdict prohibited by Wis. Stat. § 906.06(2). They concern Tony's "mental processes in connection" with reaching a verdict. *See* Wis. Stat. § 906.06(2).

> Whether the jury deliberated in Spanish or English would undoubtedly require an inquiry into the jury's deliberations and thought processes that courts should not undertake. In this connection, it bears to repeat with Sir Humphrey Davy, "Language is not only the vehicle of thought, it is a great and efficient instrument of thinking"; lexicographer Samuel Johnson adds, "Language is the dress of thought." Defendant's inquiry goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes since it questions the jury's understanding of the court's instructions and their application to the facts of this case.

United States v. Tormes-Ortiz, 734 F. Supp. 573, 577 (D. Puerto Rico 1990) (footnotes omitted).

Misapprehension of evidence is not an external influence rendering a juror competent to testify. *United States v. Vig,* 167 F.3d 443 (8th Cir. 1999).

> Examination of the method and manner in which a juror construes evidence presented during trial, would plunge this court into the very kind of post-verdict anatomization of a juror's thought processes that is barred by Rule 606(b).

Id. at 450.

> The rule against a juror's impeaching his own verdict has been applied to prohibit inquiry into an allegation that jurors misunderstood or intentionally misapplied the law, that the jurors misunderstood the charge for which the defendant was on trial. . . .

State v. Shillcutt, 119 Wis. 2d 788, 801, 350 N.W.2d 686 (1984) (footnotes omitted). Matters concerning the physical or mental incompetence of a juror are traditionally considered "internal" rather than "external" matters. *Weaver v. Puckett,* 896 F.2d 126, 128 (5th Cir. 1990); *see also Government of the Virgin Islands v. Nicholas,* 759 F.2d 1073, 1075-81 (3rd Cir. 1985) (finding that juror's allegation that a hearing impairment interfered with his understanding of the evidence at trial was not a matter of "external influence").

According to J. Weinstein & M. Berger, *Weinstein's Federal Evidence* (2nd Ed.) § 606.04 at 606-19:

> The rule [draws] a dividing line between inquiry into the thought processes of the jurors on one hand, and inquiry into the existence of conditions or the occurrence of events calculated to exert an improper influence on the verdict, on the other.
>
> . . . .
>
> If overt factors are present by which the verdict's validity can be objectively assessed, the law's commitment to just result warrants receiving evidence as to the misconduct. If the juror would testify solely to matters resting in the juror's own consciousness, however, the dubious value of the testimony is outweighed by the need for stability in

> verdicts, and Rule 606(b) renders the testimony incompetent.
>
> . . . .
>
> Rule 606(b) operates to prohibit testimony as to certain conduct by the jurors that has no verifiable outward manifestations. Excluded would be testimony that a juror misunderstood or disregarded evidence, misunderstood or disregarded the judge's instructions . . . was overcome by weariness or unsound arguments of other jurors, or by a desire to return home.

Id. at 606-14, 606-14.1, 606-22-26.

Carlson claims that the evidence of Tony's English comprehension is admissible for overriding constitutional reasons. Carlson's brief at 26. It is true that, in certain circumstances, outside influences or extraneous information may implicate a criminal defendant's right to confrontation. *See Weinstein's Federal Evidence* at 606-20 through 21. However, Wis. Stat. § 906.06(2) has contemplated that problem by permitting jurors to testify to extraneous matters that may have influenced the verdict.

> The risk stems from the possibility that a defendant's conviction rests on information not part of the evidence offered in the courtroom under the rules of evidence and under the supervision of the court. Section 906.06(2) seeks to protect a defendant's interest in a fair trial while at the same time protecting the finality of verdicts and the integrity of a jury.

Eison, 194 Wis. 2d at 173-74.

Finally, Carlson claims that the core values of Wis. Stat. § 906.06(2) are not implicated by inquiry into a juror's comprehension of trial testimony.

> This general rule of juror secrecy fosters a number of valued public policies including: (1) discouraging harassment of jurors by losing parties eager to have

> the verdict set aside; (2) encouraging free and open discussion among jurors; (3) reducing incentives for jury tampering; (4) promoting verdict finality; and (5) maintaining the viability of the jury as a judicial decisionmaking body.

Shillcutt, 119 Wis. 2d at 794; *see also* C. Mueller, *Federal Evidence* (2nd Edition) at § 247, p. 57, stating:

> A juror who reluctantly joined a verdict is likely to be sympathetic to overtures by the loser, and persuadable to the view that his own consent rested on false or impermissible considerations, and the truth will be hard to know. The triers themselves would be tried at the behest of the verdict loser, who would have much to gain in the attempt and little to lose.

Carlson asserts that the evidence he wished to elicit from jurors did not ask how a decision was made or who made it. Carlson's brief at 27. But that is exactly what the written offer of proof concerned. The second juror would have testified concerning whether Tony participated in the decisionmaking process and how the jury arrived at its verdict in light of Tony's difficulties in English. ("He did not meaningfully participate in the deliberations at any level. At one point they were asking him if he thought Mr. Carlson was a "good man or a bad man.") (77:3).

Carlson further asserts that questions concerning a juror's English comprehension do not inquire into the juror's intelligence or mental competence. Carlson's brief at 27. However, a person's English comprehension is dependent on that person's intelligence, education, and experience. Allowing a juror, who speaks English as a second language, to be questioned concerning his or her comprehension of trial testimony, may open that person to harassment based on national origin.

Moreover, Wis. Stat. § 906.06(2) does not prevent the court from obtaining the evidence it needs to determine whether a particular juror had a sufficient grasp of the English language to serve as a juror. As the trial

court did in this case, counsel and the court can examine the juror to determine whether he or she can respond to questions appropriately and can further question the juror concerning his or her education, employment and daily activities. These inquiries provide the court with the best evidence of the juror's ability to comprehend the English language, while not threatening verdict finality or the viability of the jury as a judicial decisionmaking body. "Allowing a juror's subjective opinion as to his or her ability to comprehend testimony at trial would be an open invitation to mischievous attacks on verdicts." *Carlson,* 249 Wis. 2d 264, ¶13.

Here, the court of appeals properly held that Tony's testimony concerning his understanding of witnesses at trial constituted an internal influence on the verdict. It was not an exception to the prohibition against juror testimony under Wis. Stat. § 906.06(2), since it did not constitute "extraneous prejudicial information improperly brought to the jury's attention." *Carlson,* 249 Wis. 2d 264, ¶15-16. This court should affirm the lower court decisions excluding Tony's testimony concerning his understanding of trial testimony.

Thus, the trial court's factual finding that Tony had sufficient understanding of the English language to serve as a juror was not clearly erroneous. Moreover, the trial court's decision not to order a new trial was a proper exercise of discretion, because it considered the admissible facts of the case and arrived at a conclusion consistent with applicable law. The court based its determination on an observation of Tony responding appropriately to counsels' questions and following the court's oral directions, the fact that Tony filled out his jury questionnaire without help, that he passed an English test for citizenship, that he passed a drivers license test conducted in English, that he maintained steady employment, and that he participated in activities and services in the community (100:10, 49, 66, 86-87).

E. If this court finds that the lower courts applied an incorrect legal standard for English comprehension or failed to consider admissible evidence, the appropriate remedy is a remand for a new evidentiary hearing.

The state contends that the lower courts applied the correct legal standard for English comprehension of a juror and made the correct evidentiary rulings with respect to Wis. Stat. § 906.06(2). However, if this court determines that the lower courts were in error with respect to either the correct legal standard or the admissibility of evidence, the appropriate remedy is a remand to the trial court for a new evidentiary hearing applying the correct legal standard and considering all admissible evidence. When a circuit court erroneously exercises its discretion, an appellate court may remand the matter to the circuit court to exercise its discretion or may decide the issue if the record permits. *See State v. Delgado,* 223 Wis. 2d 270, 286, 588 N.W.2d 1 (1999).

II. ANY STATUTORY ERROR IN IMPANELING CARLSON'S JURY WAS HARMLESS.

Wisconsin Stat. § 756.04(9) requires the clerk of courts to "strike the name of any person randomly selected whose returned juror qualification form shows that the person is not qualified for jury service under 756.02." It is undisputed that Tony checked "no" on the jury qualification questionnaire in response to the question, "Can you understand the English language?" (77:1). It is also undisputed that it is the clerk of courts' practice, in compliance with Wis. Stat. § 756.04(9), to disqualify a person from jury duty, if the person answers "no" to the English comprehension question (100:25-26). For some

reason, the clerk of courts did not automatically disqualify Tony and his name was entered into the computer for random jury selection (100:25-26).[4]

If the clerk of courts erred in failing to cull Tony's name from the list of prospective jurors, that error was harmless. The trial court determined that Tony did, in fact, understand sufficient English to serve on a jury (100:89). Thus, Tony met the juror qualifications under Wis. Stat. § 756.02, which requires a juror to be "able to understand the English language."

Wisconsin Stat. § 805.18(2) addresses the question of when a court should set aside a verdict or grant a new trial on the basis of an objection to the jury selection process. That section provides in relevant part that:

> (2) No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury. . ., unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

Wis. Stat. § 805.18(2); *See also State v. Lindell,* 245 Wis. 2d 689, ¶¶80-111.

Relying on *Coble,* Carlson claims that his substantial rights were affected, because the procedure for selecting his jury failed to insure that a jury composed of persons qualified under the statutes was selected. Carlson's brief at 13. In *Coble,* the complaint was that the

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[4]The state does not understand Carlson's contention that "the state did not dispute any of Carlson's substantive legal claims before the court of appeals." Carlson's brief at 13. It is true that the state did not dispute that Tony indicated he could not understand English on the jury questionnaire and that the clerk of courts did not follow the usual practice of disqualifying Tony based on his answer to that specific question. The state did not make any other concessions in the court of appeals.

Milwaukee County procedure for developing lists of prospective jurors was flawed. The court stated that the substantial rights of a party are affected if the "procedure" used fails to insure qualified persons are selected at random from a broad cross-section of the community. *Coble,* 100 Wis. 2d at 212.

In Carlson's case, there is no contention that the Brown County procedures for preparing jury lists are flawed. Instead, Carlson complains that the clerk of courts failed to apply the procedure in his particular case. A technical violation of the jury qualification statute does not warrant reversal, unless a party has been prejudiced. "[I]rregularities in the process are immaterial unless it appears probable that there has been prejudice." *Coble,* 100 Wis. 2d at 211; *see also United States v. Silverman,* 449 F.2d 1341, 1344 (2nd Cir. 1971) (The inclusion in the panel of a disqualified juror does not require reversal of a conviction unless there is a showing of prejudice); *Gattis v. Delaware,* 637 A.2d 808, 815-17 (Del. 1994) (harmless error analysis applies to jury selection procedures, noting that *United States v. Okiyama,* 521 F.2d 601 (9th Cir. 1975), suggesting otherwise, is in the minority view).

Carlson was not prejudiced by Tony's inclusion on his jury. The trial court determined that Tony understood the English language sufficiently to serve on the jury. Thus, Tony met the statutory juror qualifications under Wis. Stat. § 756.02. Furthermore, Carlson's constitutional rights to an impartial jury and due process were not violated, because Tony had sufficient English comprehension to serve on a jury. *See Turner,* 186 Wis. 2d at 284.

III. CARLSON WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Initially, the state notes that Carlson may have waived his right to challenge the composition of his jury by failing to object in a timely manner. Carlson's counsel moved for a mistrial during jury deliberations after the court received a note concerning Tony (98:654). Generally, the time to challenge a jury list is at a time prior to trial and prior to the impaneling of a specific petit jury. *Brown v. State,* 58 Wis. 2d 158, 164, 205 N.W.2d 566 (1973) (citing *Ullman v. State,* 124 Wis. 602, 607, 103 N.W. 6 (1905)). An objection to a juror must be made at voir dire or it is waived. *Cornell v. State,* 104 Wis. 527, 532, 80 N.W. 745 (1899); *see also Okershauser v. State,* 136 Wis. 111, 116 N.W. 769 (1908). However, a waived claim concerning juror qualifications can be raised under a claim of ineffective assistance of counsel. *State v. Brunette,* 220 Wis. 2d 431, 439-40, 583 N.W.2d 174 (Ct. App. 1998).

Under a claim of ineffective assistance of counsel, it is Carlson's burden to prove that his attorney's performance was deficient and that Carlson was prejudiced as a result. *See Strickland v. Washington,* 466 U.S. 668 (1984); *see also State v. Pitsch,* 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). With respect to the performance prong of the test, counsel is presumed to have acted properly, so the defendant must demonstrate that his attorney made serious mistakes which could not be justified in the exercise of objectively reasonable professional judgment, deferentially considering all the circumstances from counsel's contemporary perspective to eliminate the distortion of hindsight. *See Strickland*, 466 U.S. at 689-91; *see also Pitsch,* 124 Wis. 2d at 636-37.

With regard to the "prejudice" component, the test is whether "counsel's errors were so serious as to deprive

the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687; *see also State v. Johnson,* 133 Wis. 2d 207, 222, 395 N.W.2d 176 (1986). A defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694.

An ineffective assistance of counsel claim is a mixed question of law and fact. *See State v. Johnson,* 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The trial court's factual findings from the postconviction motion should not be disturbed unless clearly erroneous. *See id; see also State v. Harvey,* 139 Wis. 2d 353, 374-76, 407 N.W.2d 235 (1987). The legal conclusions of whether the performance was deficient and prejudicial based on those factual findings, however, are questions of law that should be reviewed independently by reviewing courts. *See Johnson,* 153 Wis. 2d at 128; *see also Pitsch,* 124 Wis. 2d at 634.

Since the defendant must show both deficient performance and prejudice to succeed in establishing ineffective assistance, the courts need not address both components of the test if the defendant makes an insufficient showing on either one. *See Strickland,* 466 U.S. at 697; *see also Johnson,* 153 Wis. 2d at 128.

Carlson claims that his counsel was ineffective for (1) failing to obtain the juror qualification questionnaire; (2) failing to ask prospective jurors at voir dire whether they understood English; and (3) failing to request an individual voir dire of Tony after the jury sent the court a note stating Tony did not understand the trial proceedings.[5] Carlson's brief at 30. This court does not have to determine whether counsel's performance was

[5]Counsel may have had a strategic reason for failing to request an individual voir dire, in light of counsel's concerns that Tony might have felt pressured to change his vote, if individually questioned by the court during the deliberations (98:657-58).

deficient, because Carlson suffered no prejudice by the inclusion of Tony on his jury.

The trial court determined that Tony had sufficient comprehension of the English language to serve on the jury (100:89). As argued in the first section of this brief, that factual finding is not clearly erroneous and, thus, must be accepted by this court. In light of the court's finding that Tony understood sufficient English to serve on the jury, counsel's failure to obtain the jury questionnaires or to voir dire Tony about his English comprehension did not prejudice Carlson. Carlson cannot prove prejudice unless, at the very least, he can show that his jury included an objectionable or incompetent member. *See State v. Lindell,* 245 Wis. 2d 689, ¶118. Since Carlson failed to demonstrate that he was prejudiced by his counsel's performance, the court of appeals properly dismissed his ineffective assistance of counsel claim. *Carlson,* 249 Wis. 2d 264, ¶24.

CONCLUSION

For the reasons stated above, the state asks this court to affirm the court of appeals decision, Carlson's conviction and sentence, and the trial court's order denying postconviction relief.

Dated at Madison, Wisconsin, this 15th day of April, 2002.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,573 words.

Eileen W. Pray
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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 01-1136-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL W. CARLSON,

Defendant-Appellant-Petitioner.

DEFENDANT-APPELLANT-PETITIONER'S REPLY BRIEF

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On appeal from the Circuit Court
of Brown County, Hon. Michael Grzeca and Mark A. Warpinski,
Circuit Judges, presiding; and the Court of Appeals,
Dist. III

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 01-1136-CR

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DEFENDANT-APPELLANT-PETITIONER'S REPLY BRIEF

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY FOUND VERA'S LEVEL OF ENGLISH COMPREHENSION SATISFIED DUE PROCESS

According to the court of appeals, "Carlson argues that the trial court must accept Vera's subjective opinion (and that of another juror) that he did not understand English well enough to fairly and competently hear the case. *State v. Carlson*, 2001 WI App 296, 249 Wis.2d 264, ¶13, 638 N.W.2d 646. (State's Brief p. 2). The court of appeals misstates Carlson's position. While it is

true that Vera repeatedly tried to communicate his inability to understand English, both before and after the trial, this was not the only evidence[1] of Vera's deficient English skills nor the only reason the trial court should have found Vera's English inadequate.

What the Court of Appeals leaves out of its analysis is the testimony of Vera's work supervisor and personal friend, Chad Watermolen, who testified unequivocally that Vera's English was seriously deficient.[2] Watermolen testified he had known Vera on a personal and professional level for approximately two years and saw him on a daily basis. (R 100:31). Apart from being his work supervisor, Watermolen was Vera's only English speaking friend. (R 100:50). Vera did not communicate in English with anyone at work other than Watermolen. (R 100:32). Watermolen had to speak to Vera "really slow" and use "small words" or he would not get a response. (R 100:33-34). Even then, Vera often did not understand what Watermolen told him to do and had to be shown what the task was. (R 100:32). Because Vera worked on an assembly line, he did not have to speak *any* English to do his job. (R 100:36). Watermolen's credibility was unimpeached.

In short, *all* of the witnesses who testified concluded from personal knowledge that Vera's English was inadequate or otherwise seriously deficient. More importantly, Vera's "subjective" self-assessment should be

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[1] The court of appeals also acknowledges but similarly rejects the "subjective opinion[] of...one other juror." *Carlson*, at ¶¶13 & 23. Apart from her experience with Vera during deliberations, the juror also recounts an episode during trial when he did not understand her when she asked him if he wanted a cigarette. (R 100:57).

[2] The only reference to Watermolen's testimony in the court of appeals opinion was that "Vera had problems with English at work." (*Carlson*, at ¶10). A slight understatement.

given great weight. He knows better than anyone else what his English skills are. The state has never once suggested that Vera's testimony was anything other than completely true and honest. The court of appeals fails to explain why Vera's self-assessment should be summarily rejected when his credibility was unimpeached. Indeed, Vera's self-assessment would have had the legal effect of keeping him off the jury list in the first place had the clerk been doing her job. (R 100:25). It should be given at least as much weight now, especially since it predates the trial and is uncontradicted.

The actual questioning of Vera also leads to only one rational conclusion--he could not have understood the trial testimony. Vera was not without any English skills. He could respond to *some* simple and leading questions, especially as they pertained to personal information. Any question which called for even the slightest complexity of English comprehension or articulation, however, stumped him. He could not, for example: describe his typical day; explain what he did for his job; or describe *any* television show he recently saw. (R 100:45, 46, 55).

The trial court's conclusion to the contrary is erroneous because it ignores important differences in language proficiency levels and fails to rationally apply the facts of the case to those levels. Not knowing the difference, it relies upon survival language skills as somehow demonstrating much more sophisticated English comprehension, while ignoring the uniformly compelling evidence to the contrary. For example, the trial court cites a mirid of facts[3] as evidence of advanced English

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[3] E.g. Buying a fishing license; watching sports on TV; playing black jack on a slot machine; having H&R Block prepare his taxes; participation "in English as a second language;" a failed attempt at college; "gainful" employment (which does not require English skills); a driver's license; and lengthy residence in this country and his citizenship. (See

comprehension. Yet these facts are, at best, only marginally useful in proving *survival* English skills, not narrative comprehension. Indeed, many of the findings have nothing to do with language comprehension, and are not presented in any particular order, which suggests the trial court did not know which of them, if any, *were* material. (See R 100:84-86). Without an analytical rudder, the trial court's ship got lost in a sea of irrelevant facts.

The state, of course, does little to address this obvious analytical gap between the trial court's findings and the underlying facts allegedly supporting them. The state takes the same "throw mud at the wall and see what sticks" approach the trial court does by citing an extensive laundry list of allegedly relevant factual "findings" without explaining how or why any one of these facts demonstrate an ability to understand narrative testimony. The state then hides behind the standard of review by demanding, in essence, that only the trial court is in a position to decide this question and therefore, must be right.

One particularly groundless finding repeatedly cited by the state and the court of appeals was that Vera answered "some very sophisticated questions." (R 100:66). Yet neither the trial court, the state, nor the court of appeals have identified which questions in the record they are referring to. Carlson has reviewed Vera's testimony in its entirety and there is not one "sophisticated" question Vera answered. This finding is emblematic of both the trial court and court of appeals decisions, as well as the state's argument: conclusions are confused with the facts that allegedly support them, with no attempt being made to show how one logically

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Carlson's Brief-in-Chief, pp. 22-23)

leads to the other.

None of the facts cited by the trial court demonstrate an ability to understand narrative testimony. The relevant facts are uniformly to the contrary.

Because the trial court's findings are clearly erroneous, no remand is necessary. This Court should order a new trial.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FAILED TO APPLY A STANDARD OF ENGLISH COMPREHENSION CONSISTENT WITH DUE PROCESS

The trial court acknowledged that a "juror's ability to understand the English language is obviously a necessary requirement for a defendant to have his day in court." (R 100:83). The trial court also recognized it was "being called upon to measure what is a sufficient understanding of the English language to allow a person to participate in jury deliberations."[4] *Id.* The trial court never articulated, however, what degree of "understanding" was sufficient to allow such participation. Nor did it ever discuss or evaluate Vera's ability to "comprehend testimony," as required by *State v. Turner*, 186 Wis.2d 277, 284, 521 N.W.2d 148 (Ct. App. 1994). Indeed, the trial court explicitly refused to apply a legal standard (R 100:87, 88) and instead relied almost exclusively on the fact that Vera had passed a citizenship test. (R 100:86, 88-89). When pressed to argue what

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[4] Focusing on deliberations, of course, ignores the more fundamental question of witness comprehension since no juror can deliberate if he did not understand what evidence was presented in the first place.

legal standard the trial court in fact applied, the State does not cite the record but instead quotes the court of appeals: "According to the court of appeals, the trial court had determined that the juror 'understood English well enough to fairly and impartially hear the case.'" (State's Brief p. 13). Of course, the trial court never actually said this. The fact remains that no specific standard of English comprehension was articulated or applied by the trial court.

This Court must articulate a standard of English comprehension which is rationally related to what a juror must do: understand testimony; understand jury instructions; and understand other jurors.[5] The standard must focus the trial court on what matters: the juror's ability to understand narrative dialogue. In short, the trial court must consider not only English comprehension, but the kind of English comprehension needed to meaningfully participate in the trial process.

The state acknowledged the holding in *Turner* and even cites it at length without criticism. (State's Brief p. 12). *Turner* held that both the Wisconsin and Federal constitutions "require that a criminal defendant not be tried by a juror who cannot *comprehend testimony*." (Emphasis added) *Turner*, 186 Wis.2d at 284. In *Turner*, the defendant alleged he was denied his constitutional rights because at least one juror was not able to hear material testimony from the sexual assault complainant. The court of appeals agreed: "...once it is determined that a juror missed material testimony which bears on a defendant's guilt or innocence, prejudice must be assumed 'for the sake of insured fairness.' [cite omitted]." *Turner*,

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[5] A juror must be able to meaningfully participate in deliberations as well, which would include both listening and speaking. Nonetheless, he must first be able to understand the testimony at trial.

at 284-285. The jurors' collective memory was not enough:

> The credibility of a witness is determined by more than a witness's words. Tonal quality, volume and speech patterns all give clues to whether a witness is telling the truth. [cite omitted] Thus, it was critical for each juror to hear the testimony from each witness *and relate that testimony to the witness's demeanor.* We therefore reject the State's contention that putting all the witnesses together resulted in the jury getting enough evidence to fairly judge Turner.

(Emphasis added) *Turner*, at 285.[6] All Carlson is asking is that this same standard be applied in his case.

Nonetheless, the state takes issue with Carlson's proposal that jurors be required to "substantially" comprehend trial testimony in order to satisfy due process. (Carlson's Brief-in-Chief p. 15). Carlson sees little difference between his proposal and what the state appears to concede is the law in Wisconsin under *Turner*. Indeed, one could even argue that the term "comprehend testimony," without any qualification, requires more than "substantial" comprehension. Carlson does not see the difference as a material one. Carlson believes either test would satisfy due process. In any event, the trial court did not find Vera could "comprehend" *testimony*, substantially or otherwise.

Carlson accepts the fact that trial courts are not going to become linguists. Nonetheless, as this case sorely illustrates, the trial court must have some knowledge of non-native language acquisition. In other words, the trial court must know there are many levels of

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[6] The state also cites *State v. Hampton*, 201 Wis.2d 662, 668, 549 N.W.2d 756 (Ct. App. 1996), which remanded for the trial court to determine the extent a juror was inattentive during trial.

language comprehension and that a fairly high level is necessary for meaningful participation in a court room setting. The trial court must be able to distinguish between survival English skills and more advanced narrative capabilities. By emphasizing a juror's ability to understand actual testimony rather than his ability to understand "English" in some generalized, undefined fashion, Carlson's proposed standard is more likely to assure that the language skills necessary for meaningful--and constitutionally sound--juror participation are present.

III. APPLICATION OF WIS. STAT. § 906.06

The undisputedly admissible evidence more than demonstrates Vera's inadequate English comprehension. If this court agrees, a review of Wis. Stat. § 906.06 is not necessary. In fact, Carlson is tempted to concede the contested evidence entirely (See Carlson's Brief-in-Chief, pp. 9-10, 24-25) as he does not want to turn this case into an argument over the scope of Wis. Stat. § 906.06. Nonetheless, Wisconsin appellate courts have carved exceptions to this rule in the past. See *Anderson v. Burnett County*, 207 Wis.2d 587, 596, 558 N.W.2d 636, 641 (Ct.App. 1996) (Evidence of racial or religious bias would constitute an exception to the rule that mental processes are not subject to post-trial inquiry because of "an obvious default of justice"); See also *State v. Messelt*, 185 Wis.2d 254, 278, 518 N.W.2d 232, 242 (1994) ("This court will not adopt any statutory interpretation which renders meaningless a party's most basic constitutional rights.") It would seem logical to carve an exception here as well since juror language comprehension clearly affects the fundamental rights of the accused at least as much as juror racial or religious bias. Carlson cannot, therefore, simply abandon his argument.

The state raises several other points Carlson will address briefly.

The state also suggests that English comprehension requirements must be kept low to prevent discrimination against, or harassment of, potential jurors based upon national origin. (State's Brief pp. 10, 29). This argument must be rejected for at least two reasons. First, an accused has a right to jurors who comprehend testimony. The court cannot trade a defendant's constitutional rights for what may or may not result in a broader inclusion in the trial process. Anything less than adequate juror English comprehension, moreover, would severely undermine the credibility of the trial process. Second, this argument misses the point. Non-native speakers can serve as jurors, just as deaf people can, but they have to be provided with appropriate translators. Even those who advocate for the inclusion of non-native speakers concede they must be able to understand what the witnesses are saying through the aid of an interpreter. See e.g. Cynthia Brown, *A Challenge To The English-Language Requirement of the Juror Qualification Provision of New York's Judiciary Law*, 39 N.Y. Law School Law Review, No. 3, p. 502 (1994).

The state also suggests that in cases where consent is an issue, language skills are less important: while "consent is often a difficult question to determine, its difficulties do not lie in the complexity of the language employed." (State's Brief p. 14). To the contrary, it is this very type of "complexity" which is the most difficult of all for non-native speakers. As the ACTFL guidelines demonstrate, only at the highest level is a non-native speaker able to understand highly colloquial speech or speech with strong social and cultural references. See Carlson's Brief-in-Chief, pp. 19, n. 10. Indeed, the *Turner* court did not hesitate to reverse in a case centering

on witness credibility when one juror did not hear material testimony from one of the witnesses. *Turner*, 186 Wis.2d at 284.

Finally, the state argues that if the trial court erroneously exercised its discretion, the remedy is to remand to the trial court for a new evidentiary hearing so it can apply the correct legal standard and consider all admissible evidence. The state also acknowledges the appellate court may decide the issue without remand if the record permits. (State's Brief p. 31). Here, the record does so permit as the appellate court would merely be applying a legal standard to undisputed facts. If this court does remand the case for further proceedings it should allow both parties to present whatever additional testimony may be relevant.

CONCLUSION

The sad fact is that both the trial court and the court of appeals decisions are grounded in linguistic naivete. Neither have acknowledged the complexities of non-native language acquisition, in particular the wide gap between survival English skills and narrative comprehension. This Court must acknowledge those complexities and use this case to bring Wisconsin courts back into the mainstream of linguistic science, and restore confidence in our jury system.

Carlson's conviction should be reversed and the case remanded for a new trial.

Respectfully submitted this 25th day of April, 2002.

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), and that the text is:

CG Times proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line.

This brief and certification contain 2983 words.

Dated this 25th day of April, 2002.

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